

No. 14647

United States
Court of Appeals
for the Ninth Circuit

HARRY C. WESTOVER, Former Collector of Internal Revenue, Sixth Collection District of California,

Appellant,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation,

Appellee.

ROBERT A. RIDDELL, Collector of Internal Revenue, Sixth Collection District of California,

Appellant,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation,

Appellee.

Transcript of Record

FILED

APR 18 1955

Appeals from the United States District Court,
Southern District of California
Central Division

PAUL P. GARRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellee:

BINFORD & BINFORD,
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Los Angeles, California.

JAMES A. CASTER,
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Los Angeles, California.

District Court of the United States for the Central
Division of the Southern District of California

Civil Action No. 11879-PH

STOCKHOLDERS PUBLISHING COMPANY,
INC.,

Plaintiff,

vs.

HARRY C. WESTOVER, Former Collector of In-
ternal Revenue, Sixth Collection District of
California; JOHN DOE and RICHARD ROE;

Defendants.

COMPLAINT
(Refund of Taxes)

For its cause of action against the above-named
defendants the above-named plaintiff alleges:

1. That jurisdiction is conferred by Title 28,
Part IV, Chapter 85, Section 1340 of the United
States Code.

2. That the Plaintiff, Stockholders Publishing
Company, Inc., is a corporation organized under
the laws of the State of Nevada and has met all
qualifications as a foreign corporation to transact
business in the State of California. That its prin-
cipal place of business is in the City of Los An-
geles, Los Angeles County, State of California.

3. That Defendant, Harry C. Westover, was at
all times mentioned herein, the Collector of Internal
Revenue for the sixth collection district of Cali-

ifornia; that the payments herein sought to be recovered were made to him while he occupied the position of Collector of Internal Revenue and were so paid to him as the collector of internal revenue.

4. That the true names of the defendants, John Doe and Richard Roe, are unknown [2*] to the plaintiff at this time, and it is requested that plaintiff be permitted to amend the complaint and insert, their true names in the place of such fictitious names when the true names become known to the plaintiff.

5. That on the 15th day of December, 1948, taxes and interest in the amount of \$8,068.51 were paid to the defendant for the taxable year ending on December 31, 1943, and on the 15th day of December, 1948, taxes and interest in the amount of \$8,944.53 were paid to the defendant for the taxable year ending on December 31, 1944, or a total of \$17,013.04, pursuant to defendant's demand.

6. That claims for refund were filed with the defendant on April 21, 1949, for the amount of \$17,013.04 on the ground that the said amount had been illegally collected by said Harry C. Westover as Collector of Internal Revenue in that the route district men and dealers in newspapers published by plaintiff were not employees of plaintiff as contended by defendant but were independent contractors. That attached hereto and marked Exhibits A and B, respectively, and hereby made a part of this complaint, are true copies of the said claims for refund.

7. That the claims for refund have not been allowed or paid but have been disallowed. That a copy of a letter informing taxpayer of the disallowance of its claims is attached hereto and marked Exhibit C and hereby made a part of this complaint.

8. The facts upon which plaintiff's claim are based are:

(a) In the years 1943 and 1944 plaintiff was in the business of publishing a daily newspaper, the Daily News, at Los Angeles, California.

(b) That the said plaintiff, as publisher and distributor of the said Daily News, sold newspapers to certain route district men and dealers at a wholesale price and was paid therefor by the said route district men and dealers. That the said route district men and dealers resold, or offered for resale, the newspapers so purchased retaining any excess over their cost, as their profits in the transaction.

(c) That the Commissioner of Internal Revenue, erroneously found and determined that the said route district men and dealers were employees of the plaintiff and not independent contractors. That the Commissioner of Internal Revenue erroneously determined that the excess of the said selling price of such [3] newspapers by the route district men and the dealers, over the wholesale price paid to plaintiff, was taxable under the Federal Unemployment Tax Act.

(d) That as a result of the Commissioner's error the amount of \$7,558.52 was assessed by him

against the plaintiff for the year 1943 with interest thereon in the sum of \$509.99, or a total of \$8,068.51. That as a result of the Commissioner's error the amount of \$8,379.17 was assessed by him against the plaintiff for the year of 1944 with interest thereon in the sum of \$565.36 or a total of \$8,944.53. That the aggregate of said amounts so paid on assessments for said two years was \$17,013.04 which amount was duly paid by plaintiff on the 15th day of December, 1948, to and upon the demand of the defendant, Harry C. Westover, as Collector of Internal Revenue.

9. That the said route district men and dealers were not employees of the plaintiff but per contra are independent contractors and as independent contractors the profits earned by them from the resale of newspapers as aforesaid are non-taxable under the Federal Unemployment Tax Act.

10. That the assessments and collection of the above-mentioned taxes and interest were erroneous and illegal, and the plaintiff was and is entitled to have a refund from said defendant of said sum of \$17,013.04 with interest thereon from December 15, 1948.

11. That plaintiff's claims for refund have not been satisfied either in whole or in part, and the total amount, namely, \$17,013.04, is now due and owing from the defendant.

Wherefore, plaintiff prays:

1. For Judgment against defendant in the sum

of \$17,013.04 with interest thereon as aforesaid together with its costs;

2. For such other relief as the Court may deem just and proper.

BINFORD AND BINFORD,

By /s/ L. B. BINFORD,

/s/ JAMES A. CASTER,

Attorneys for Plaintiff.

Duly verified. [4]

EXHIBIT A

Claim

Form 843

Treasury Department,
Internal Revenue Service.

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector Will Indicate in the Block Below the
Kind of Claim Filed, and Fill in the Certificate
on the Reverse.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Collector's Stamp (Date received): [Blank.]

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Stock-
holders Publishing Company, Inc.

Business address: 1257 So. Los Angeles St., Los
Angeles 15, California.

Residence:

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: 6th District, Los Angeles, California.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year): From Jan. 1, 1943, to Dec. 31, 1943.
3. Character of assessment or tax: Excise Tax on Employer Under Federal Unemployment Tax Act.
4. Amount of assessment: \$8,068.51.
Dates of payment: December 15, 1948.
5. Date stamps were purchased from the Government:
6. Amount to be refunded: \$8,068.51.
7. Amount to be abated (not applicable to income, gift, or estate taxes):.....
8. The time within which this claim may be legally filed expires, under section 3313 of Internal Revenue Code, on December 15, 1952.

The deponent verily believes that this claim should be allowed for the following reasons:

The tax assessed was made to cover compensation payments to route district men and dealers for distribution of newspapers published by the taxpayer, on the contention that the said route district men and dealers were employees for Federal Unemployment Tax purposes and not independent contractors as contended by taxpayer.

Under the law (Public Law 642, 80th Congress, enacted June 14, 1948, which has the same effect as if included in the Internal Revenue Code on February 10, 1939), the question of whether or not an individual is an independent contractor or an employee for purposes of assessing the Federal Unemployment Tax, must be determined by the common law rules applicable in determining the employer-employee relationship.

By applying the common law rules, it is the taxpayer's contention that the route district men and the dealers are independent contractors.

/s/ J. J. PADULO,

Treasurer, Stockholders Publishing Company, Inc.

Subscribed and sworn to before me this 21st day of April, 1949.

[Seal] /s/ AZILEE DURHAM,

Notary.

My commission expires Feb. 27, 1953. [5]

EXHIBIT B

Claim

Form 843,
 Treasury Department,
 Internal Revenue Service.
 (Revised July, 1947.)

To Be Filed With the Collector Where Assessment
 Was Made or Tax Paid

The Collector Will Indicate in the Block Below the
 Kind of Claim Filed, and Fill in the Certificate
 on the Reverse.

- Refund of Taxes Illegally, Erroneously, or
 Excessively Collected.
- Refund of Amount Paid for Stamps Un-
 used or Used in Error or Excess.
- Abatement of Tax Assessed (not applica-
 ble to estate, gift, or income taxes).

Collector's Stamp (Date received) [Blank.]

State of California,
 County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Stock-
 holders Publishing Company, Inc.

Business address: 1257 So. Los Angeles St., Los
 Angeles 15, California.

Residence:

The deponent, being duly sworn according to law,
 deposes and says that this statement is made on

behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: 6th District, Los Angeles, California.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year): From Jan. 1, 1944, to Dec. 31, 1944.
3. Character of assessment or tax: Excise Tax on Employer Under Federal Unemployment Tax Act.
4. Amount of assessment: \$8,944.53.
Dates of payment: December 15, 1948.
5. Date stamps were purchased from the Government:
6. Amount to be refunded: \$8,944.53.
7. Amount to be abated (not applicable to income, gift, or estate taxes):.....
8. The time within which this claim may be legally filed expires, under section 3313 of Internal Revenue Code, on December 15, 1952.

The deponent verily believes that this claim should be allowed for the following reasons:

The tax assessed was made to cover compensation payments to route district men and dealers for distribution of newspapers published by the taxpayer, on the contention that the said route district men and dealers were employees for Federal Unemployment Tax purposes and not independent contractors as contended by the taxpayer.

Under the law (Public Law 642, 80th Congress, enacted June 14, 1948, which has the same effect as if included in the Internal Revenue Code on February 10, 1939), the question of whether or not an individual is an independent contractor or an employee for purposes of assessing the Federal Unemployment Tax, must be determined by the common law rules applicable in determining the employer-employee relationship.

By applying the common law rules, it is the taxpayer's contention that the route district men and the dealers are independent contractors.

/s/ J. J. PADULO,

Treasurer, Stockholders Publishing Company, Inc.

Subscribed and sworn to before me this 21st day of April, 1949.

/s/ AZILEE DURHAM,

Notary.

My commission expires Feb. 27, 1953. [8]

EXHIBIT C

(Copy)

U. S. Treasury Department, Washington 25

Oct. 20, 1949.

Office of: Commissioner of Internal Revenue.

Address Reply to: Commissioner of Internal Revenue and Refer to:

EmT:A:AA:4-THS,

Cls-876901 and 876902.

Stockholders Publishing Co., Inc.,

1257 South Los Angeles Street,

Los Angeles 15, California.

Sirs:

Reference is made to your claims in the respective amounts of \$8,068.51 and \$8,944.53 for refund of excise tax and interest paid for the years 1943 and 1944 under the Federal Unemployment Tax Act. The basis of your claims is given as follows:

“The tax assessed was made to cover compensation payments to route district men and dealers for distribution of newspapers published by the taxpayer, on the contention that the said route district men and dealers were employees for Federal Unemployment Tax purposes and not independent contractors as contended by the taxpayer.

“Under the law (Public Law 642, 80th Congress enacted June 14, 1948, which has the same

effect as if included in the Internal Revenue Code on February 10, 1939), the question of whether or not an individual is an independent contractor or an employee for purposes of assessing the Federal Unemployment Tax, must be determined by the common law rules applicable in determining the employer-employee relationship.

“By applying the common law rules, it is the taxpayer’s contention that the route district men and the dealers are independent contractors.”

The records of this office disclose that in Bureau letter, dated October 16, 1947, as subsequently modified, it was held that certain individuals performing services for you as route district men and dealers for distribution of newspapers published by you were your employees for Federal Employment Tax purposes. Such ruling was made on the basis of the provisions of Section 402.204 of Regulations 106 relating to the Federal Insurance Contributions Act and Section 403.204 of Regulations 107 relating to the Federal Unemployment Tax Act which are in conformity with the provisions of Public Law No. 642.

No additional information has been presented to this office which would warrant a further modification of or a revocation of the ruling dated October 16, 1947, as modified.

Your claims for refund are disallowed. This notice of disallowance is sent by registered mail in

accordance with the provisions of Section 3772(a)
(2) of the Internal Revenue Code.

By direction of the Commissioner.

Respectfully,

/s/ VICTOR H. SELF,
Deputy Commissioner.

THS:BJL.

[Endorsed]: Filed July 7, 1950. [10]

[Title of District Court and Cause.]

No. 11879-PH

ANSWER

Comes now the defendant in the above-entitled
action and in answer to plaintiff's complaint, ad-
mits, denies and alleges:

I.

Admits the allegations contained in Paragraph 1.

II.

Admits the allegations contained in Paragraph 2.

III.

Admits the allegations contained in Paragraph 3.

IV.

Denies the allegations contained in Paragraph 4.

V.

Admits the allegations contained in [11] Para-
graph 5.

VI.

Paragraph 6 is denied, except it is admitted that on April 21, 1949, plaintiff filed claims for refund in the amount of \$17,013.04, and that Exhibits A and B to the complaint are copies of said claims for refund. The defendant alleges that the claims for refund speak for themselves with respect to their contents and denies the averments contained in said refund claims to the extent that the averments in said claims are not otherwise specifically admitted in this answer.

VII.

Admits the allegations contained in Paragraph 7.

VIII.

Admits the allegations contained in Paragraph 8(a).

IX.

The defendant is without knowledge or information sufficient to form a belief as to the truth of Paragraph 8(b).

X.

Paragraph 8(c) is denied, except it is admitted that the Commissioner determined that the route district men and the dealers were employees of plaintiff and that their earnings were taxable under the Federal Unemployment Tax Act.

XI.

Paragraph 8(d) is admitted, except it is denied that there was any error on the part of the Commissioner, and it is alleged that the payments were made on December 21, 1948, and January 3, 1949.

XII.

Denies the allegations contained in Paragraph 9.

XIII.

Denies the allegations contained in Paragraph 10.

XIV.

Paragraph 11 is denied, except it is admitted that plaintiff's claims for refund have not been satisfied. [12]

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

ERNEST A. TOLIN,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistants United States
Attorney;

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of
Internal Revenue;

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 11, 1950. [13]

District Court of the United States for the Central
Division of the Southern District of California

Civil Action No. 14627

STOCKHOLDERS PUBLISHING COMPANY,
INC.,

Plaintiff,

vs.

ROBERT A. RIDDELL, Collector of Internal
Revenue, Sixth Collection District of California;
JOHN DOE, and RICHARD ROE,

Defendants.

COMPLAINT
(Refund of Taxes)

For its cause of action against the above-named defendants the above-named plaintiff alleges:

1. That jurisdiction is conferred by Title 28, Part IV, Chapter 85, Section 1340 of the United States Code.

2. That the Plaintiff, Stockholders Publishing Company, Inc., is a corporation organized under the laws of the State of Nevada and has met all qualifications as a foreign corporation to transact business in the State of California. That its principal place of business is in the City of Los Angeles, Los Angeles County, State of California.

3. That Defendant, Robert A. Riddell, was at all times mentioned herein, the Collector of Internal Revenue for the sixth collection district of Cali-

ifornia; that the payments herein sought to be recovered were made to him while he occupied the position of Collector of Internal Revenue and were so paid to him as the Collector of Internal Revenue.

4. That the true names of the defendants, John Doe and Richard Roe, are [15] unknown to the plaintiff at this time, and it is requested that plaintiff be permitted to amend the complaint and insert their true names in the place of such fictitious names when the true names become known to the plaintiff.

5. That on the 12th day of July, 1950, taxes and interest in the amount of \$8,796.64 were paid to the defendant for the taxable year ending on December 31, 1945, pursuant to defendant's demand.

6. That a claim for refund was filed with the defendant on July 31, 1950, for the amount of the said taxes or for the amount of \$8,671.51 on the ground that the said amount had been illegally collected by the said Robert A. Riddell as Collector of Internal Revenue in that the route district men and dealers in newspapers published by plaintiff were not employees of plaintiff as contended by defendant but were independent contractors. That attached hereto, marked Exhibit A and hereby made a part of this complaint, is a true copy of the said claim for refund.

7. That the claim for refund has not been allowed or paid but has been disallowed. That a copy of a letter informing taxpayer of the disallowance

of its claim is attached hereto and marked Exhibit B and hereby made a part of this complaint.

8. The facts upon which plaintiff's claim is based are:

(a) In the year 1945 plaintiff was in the business of publishing a daily newspaper, the Daily News, at Los Angeles, California.

(b) That the said plaintiff, as publisher and distributor of the said Daily News, sold newspapers to certain route district men and dealers at a wholesale price and was paid therefor by the said route district men and dealers. That the said route district men and dealers resold, or offered for resale, the newspapers so purchased retaining any excess over their cost, as their profits in the transaction.

(c) That the Commissioner of Internal Revenue, erroneously found and determined that the said route district men and dealers were employees of the plaintiff and not independent contractors. That the Commissioner of Internal Revenue erroneously determined that the excess of the said selling price of such newspapers by the route district men and the dealers, over the wholesale price paid [16] to plaintiff, was taxable under the Federal Unemployment Tax Act.

(d) That as a result of the Commissioner's error the amount of \$8,671.51 was assessed by him against the plaintiff for the year 1945 with interest thereon in the sum of \$125.13 or a total of \$8,796.64. That the aggregate of said amounts on assessment was

duly paid by plaintiff on the 12th day of July, 1950, to and upon the demand of the defendant, Robert A. Riddell as Collector of Internal Revenue.

9. That the said route district men and dealers were not employees of the plaintiff but per contra are independent contractors and as independent contractors the profits earned by them from the resale of newspapers as aforesaid are non-taxable under the Federal Unemployment Tax Act.

10. That the assessments and collection of the above-mentioned taxes and interest were erroneous and illegal, and the plaintiff was and is entitled to have a refund from said defendant of said sum of \$8,796.64 with interest thereon from July 12, 1950.

11. That plaintiff's claim for refund has not been satisfied either in whole or in part, and the total amount, namely, \$8,796.64, is now due and owing from the defendant.

Wherefore, plaintiff prays:

1. For Judgment against defendant in the sum of \$8,796.64 with interest thereon as aforesaid together with its costs;

2. For such other relief as the Court may deem just and proper.

BINFORD AND BINFORD,

By /s/ L. B. BINFORD,

/s/ JAMES A. CASTER,

Attorneys for Plaintiff.

Duly verified. [17]

EXHIBIT A

Claim

Form 843,
U. S. Treasury Department,
Internal Revenue Service.

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector Will Indicate in the Block Below
the Kind of Claim Filed, and Fill in, Where
Required, the Certificate on the Back of This
Form.

- Refund of Taxes Illegally, Erroneously, or
Excessively Collected.
- Refund of Amount Paid for Stamps Un-
used, or Used in Error or Excess.
- Abatement of Tax Assessed (not applica-
ble to estate, gift, or income taxes).

Collector's Stamp (Date received): [Blank.]

Name of taxpayer or purchaser of stamps: Stock-
holders Publishing Company, Inc.

Street address: 1257 So. Los Angeles St., Los An-
geles 15, California.

City, postal zone number, and State:.....

1. District in which return (if any) was filed: 6th
District, Los Angeles, Calif.
2. Period (if for tax reported on annual basis, pre-
pare separate form for each taxable year): From
Jan. 1, 1945, to Dec. 31, 1945.

3. Kind of tax: Excise Tax on Employer Under Federal Unemployment Tax Act.
4. Amount of assessment: \$8,671.51.
Dates of payment: July 12, 1950.
5. Date stamps were purchased from the Government:
6. Amount to be refunded: \$8,671.51.
7. Amount to be abated (not applicable to income, estate, or gift taxes):

The claimant believes that this claim should be allowed for the following reasons:

The tax assessed was made to cover compensation payments to route district men and dealers for distribution of newspapers published by the taxpayer, on the contention that the said route district men and dealers were employees for Federal Unemployment Tax purposes and not independent contractors as contended by taxpayer.

Under the law (Public Law 642, 80th Congress, enacted June 14, 1948, which has the same effect as if included in the Internal Revenue Code on February 10, 1939), the question of whether or not an individual is an independent contractor or an employee for purposes of assessing the Federal Unemployment Tax, must be determined by the common law rules applicable in determining the employer-employee relationship.

By applying the common law rules, it is the taxpayer's contention that the route district

men and the dealers are independent contractors.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ J. J. PADULO,

Treasurer, Stockholders Publishing Company, Inc.

Dated July 31, 1950. [19]

EXHIBIT B

(Copy)

U. S. Treasury Department, Washington 25

October 27, 1950.

Office of: Commissioner of Internal Revenue.

Address reply to: Commissioner of Internal Revenue and refer to:

EmT:A:AA:4-THS,

Cl-890790.

Stockholders Publishing Co., Inc.,
1257 South Los Angeles Street,
Los Angeles 15, California.

Sirs:

Reference is made to your claim on Form 843 in the amount of \$8,671.51 for refund of excise tax

and interest paid for the year 1945 under the Federal Unemployment Tax Act. The basis of your claim is given as follows:

“The tax assessed was made to cover compensation payments to route district men and dealers for distribution of newspapers published by the taxpayer, on the contention that the said route district men and dealers were employees for Federal Unemployment Tax purposes and not independent contractors as contended by taxpayer.

“Under the law (Public Law 642, 80th Congress, enacted June 14, 1948, which has the same effect as if included in the Internal Revenue Code on February 10, 1939), the question of whether or not an individual is an independent contractor or an employee for purposes of assessing the Federal Unemployment Tax, must be determined by the common law rules applicable in determining the employer-employee relationship.

“By applying the common law rules, it is the taxpayer’s contention that the route district men and the dealers are independent contractors.”

The records of this office disclose that in Bureau letter, dated October 16, 1947, as subsequently modified, it was held that certain individuals performing services for you as route district men and dealers for distribution of newspapers published by you

were your employees for Federal employment tax purposes. Such ruling was made on the basis of the provisions of Section 402.204 of Regulations 106 relating to the Federal Insurance Contributions Act and Section 403.204 of Regulations 107, relating to the Federal Unemployment Tax Act which are in conformity with the provisions of Public Law No. 642.

No additional information has been presented to this office which would warrant a further modification of or a revocation of the ruling dated October 16, 1947, as modified.

Your claim for refund is disallowed. This notice of disallowance is sent by registered mail in accordance with the provisions of Section 3772(a)(2) of the Internal Revenue Code.

By direction of the Commissioner:

Respectfully,

/s/ VICTOR H. SELF,

Deputy Commissioner.

THS:CRS.

[Endorsed]: Filed October 20, 1952. [21]

[Title of District Court and Cause.]

No. 14,627-HW

ANSWER

Comes Now the Defendant, Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, and in answer to the complaint herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph 1.

II.

Admits the allegations contained in Paragraph 2.

III.

Admits the allegations contained in Paragraph 3.

IV.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4. [22]

V.

Admits the allegations contained in Paragraph 5, except it is alleged that payment was made on July 4, 1950.

VI.

Denies the allegations contained in Paragraph 6, except it is admitted and alleged that on August 1, 1950, plaintiff filed a claim for refund in the amount of \$8,671.51 and that Exhibit A to the com-

plaint is a copy of said claim for refund. The defendant alleges that the claim for refund speaks for itself with respect to its contents, and denies the averments contained in said claim for refund to the extent that such averments are not otherwise specifically admitted in this answer.

VII.

Admits the allegations contained in paragraph 7

VIII.

(a) Admits the allegations contained in Paragraph 8(a).

(b) The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8(b).

(c) Denies the allegations contained in Paragraph 8(c), except it is admitted that the Commissioner of Internal Revenue determined that the district route men and dealers were employees of plaintiff for purposes of the Federal Unemployment Tax Act and that their earnings were taxable under said Act.

(d) Denies the allegations contained in Paragraph 8(d), except it is alleged that as a result of the Commissioner's determination, additional taxes were assessed against plaintiff for the year 1945 in the amount of \$8,671.51, with interest thereon in the sum of \$124.13, or a total of \$8,795.64. It is further alleged that the aggregate amount of said assessment was paid by plaintiff on the 14th day of July, 1950, to and upon the demand of the defend-

ant, Robert A. Riddell, as Collector of Internal Revenue. [23]

IX.

Denies the allegations contained in Paragraph 9.

X.

Denies the allegations contained in Paragraph 10.

XI.

Denies the allegations contained in Paragraph 11, except it is admitted that plaintiff's claim for refund has not been satisfied.

Wherefore, having fully answered, defendant prays that he be hence dismissed with his costs in this behalf expended.

WALTER S. BINNS,

United States Attorney;

E. H. MITCHELL, and

EDWARD R. McHALE,

Assistants U. S. Attorney;

EUGENE HARPOLE, and

FRANK W. MAHONEY,

Special Attorneys, Bureau of
Internal Revenue;

By /s/ EUGENE HARPOLE,

Attorneys for Defendant Robert A. Riddell, Collector of Internal Revenue, Sixth District of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 19, 1953. [24]

[Title of District Court and Cause.]

Nos. 11,879-PH and 14,627-PH

MINUTES OF THE COURT—JUNE 29, 1954

Present: Hon. Peirson M. Hall, District Judge.

Counsel for plaintiff: J. A. Caster and
Howard Binford.

Counsel for Defendant: Bruce I. Hoch-
man, Ass't. U. S. Att'y.

Proceedings:

For trial. By stipulation of the parties It Is
Ordered that these two causes are Consolidated for
all purposes.

Counsel make statements.

Arthur G. Pollock is called, sworn, and testifies
for plaintiff.

Plf's Ex. 1 is marked and admitted in evidence.

Plf's Ex. 2 and 3 are admitted in evidence.

F. W. Fahs is called, sworn, and testifies for
plaintiff.

Plf's Ex. 4 is admitted in evidence.

C. D. Melton is called, sworn, and testifies for
plaintiff.

Plaintiff rests.

Samuel G. Mahdesian is called, sworn, and testi-
fies for defendant.

Deft's Ex. A, B and C are admitted in evidence.

Defendant rests, Plaintiff rests.

Court hears argument, and Orders judgment for

plaintiff; counsel for plaintiff to prepare findings of fact, conclusions of law, and judgment.

EDMUND L. SMITH,
Clerk. [26]

[Title of District Court and Cause.]

Civil Action No. 11879—P.H.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Court on the 29th day of June, 1954, the Honorable Peirson M. Hall, Judge, presiding; Binford & Binford, by Howard M. Binford and James A. Caster, appearing as attorneys for the plaintiff, Stockholders Publishing Company, Inc., and Harry C. Westover, Former Collector of Internal Revenue, Sixth Collection District of California, by Laughlin E. Waters, United States Attorney, by Robert H. Wyshak and Bruce I. Hochman, appearing as attorneys for defendant.

Both oral and documentary evidence was offered by the parties plaintiff and defendant, and the Court having heard and examined and given due consideration to such evidence, both oral [27] and documentary, and the cause having been duly submitted to the Court for its decision, and the Court being fully advised in the premises, and after due consideration, now makes its Findings of Fact and Conclusions of Law, to wit:

Findings of Fact

I.

That each and all of the allegations in plaintiff's complaint are true.

II.

That all of the denials and allegations in defendant's answer are untrue except as to those allegations in defendant's answer which admit the truth of allegations contained in plaintiff's complaint.

III.

That it is true that jurisdiction is conferred by Title 28, Part IV, Chapter 85, Section 1340 of the United States Code.

IV.

That it is true that the plaintiff, Stockholder Publishing Company, Inc., is a corporation organized under the laws of the State of Nevada, and has met all qualifications as a foreign corporation to transact business in the State of California, and that its principal place of business is in the City of Los Angeles, County of Los Angeles and State of California.

V.

That it is true that defendant, Harry C. Westover, was at all times mentioned in plaintiff's complaint, the Collector of Internal Revenue for the Sixth Collection District of California, and that the payments sought to be recovered by plaintiff in this action were made to him while he occupied the position of Collector of Internal Revenue, and were s

paid to him as the Collector of Internal [28] Revenue.

VI.

That it is true that on the 15th day of December, 1948, taxes and interest in the sum of Eight Thousand Sixty-eight Dollars and Fifty-one Cents (\$8,068.51) were paid to the defendant by plaintiff for the taxable year ending on December 31, 1943, and that on the 15th day of December, 1948, taxes and interest in the sum of Eight Thousand Nine Hundred Forty-four Dollars and Fifty-three Cents (\$8,944.53) were paid to the defendant by plaintiff for the taxable year ending on December 31, 1944, said taxes being paid pursuant to defendant's demand.

That it is true that the total amount of taxes and interest paid to the defendant by plaintiff, as aforesaid, is Seventeen Thousand Thirteen Dollars and Four Cents (\$17,013.04).

VII.

That it is true that Claims for Refund were filed with the defendant on April 21, 1949, for the amount of the taxes to be refunded in the said sum of Seventeen Thousand Thirteen Dollars and Four Cents (\$17,013.04), and on the ground that said taxes had been illegally collected by the said Harry C. Westover, as Collector of Internal Revenue, Sixth Collection District of California, in that the route district men and dealers in newspapers published by the plaintiff were not employees of plaintiff but were independent contractors.

That it is true that "Exhibit A" and "Exhibit B" attached to plaintiff's complaint are true copies of the said Claims for Refund filed by plaintiff with the said Harry C. Westover as Collector of Internal Revenue on April 21, 1949.

VIII.

That it is true that said Claims for Refund were not allowed or paid but were disallowed by the Commissioner of Internal Revenue. That it is true that the copy of a letter dated October 20, 1949, attached to plaintiff's complaint and marked "Exhibit C," is a true [29] and correct copy of the letter wherein plaintiff was informed of the disallowance of its said claim.

IX.

That it is true:

(a) That in the years 1943 and 1944 plaintiff was in the business of publishing a daily newspaper, the "Daily News," at Los Angeles, California.

(b) That said plaintiff, as publisher and distributor of said "Daily News" sold newspapers to certain route district men and dealers at a wholesale price and was paid therefor by said route district men and dealers.

That it is true that said route district men and dealers resold or offered for resale, the newspapers so purchased by them, and that it is true that they retained any excess over the cost of said newspapers to them as their profits in the transaction.

(c) That the Commissioner of Internal Revenue erroneously found and determined that the route

district men and dealers were employees of the plaintiff and not independent contractors. That it is true that the Commissioner of Internal Revenue erroneously determined that the excess of the said selling price of such newspapers by the route district men and the dealers over the wholesale price paid to plaintiff, was taxable under the Federal Unemployment Tax Act.

(d) That as a result of the Commissioner's error, the amount of Seven Thousand Five Hundred Fifty-eight Dollars and Fifty-two Cents (\$7,558.52) was assessed by said Commissioner against the plaintiff for the year 1943, with interest thereon in the sum of Five Hundred Nine Dollars and Ninety-nine Cents (\$509.99), making a total of Eight Thousand Sixty-eight Dollars and Fifty-one Cents (\$8,068.51). That as a result of the Commissioner's error, the amount of Eight Thousand Three Hundred Seventy-nine Dollars and Seventeen Cents (\$8,379.17) was assessed [30] by said Commissioner against the plaintiff for the year 1944, with interest thereon in the sum of Five Hundred Sixty-five Dollars and Thirty-six Cents (\$565.36), making a total of Eight Thousand Nine Hundred Forty-four Dollars and Fifty Cents (\$8,944.50). That it is true that the aggregate of said assessments, to wit, the said sum of Seventeen Thousand Thirteen Dollars and Four Cents (\$17,013.04), was duly paid by plaintiff on the 15th day of December, 1948, to and upon the demand of the defendant, Harry C. Westover, as Collector of Internal Revenue.

X.

That it is true that said route district men and dealers were not employees of the plaintiff. That it is true that the said route district men and dealers were independent contractors. That it is true that the profits earned by them from the resale of news papers, as aforesaid, are non-taxable under the Federal Unemployment Tax Act.

XI.

That it is true that the assessment and collection of said taxes and interest thereon in the total sum of Seventeen Thousand Thirteen Dollars and Four Cents (\$17,013.04) was erroneous and illegal.

Conclusions of Law

And as Conclusions of Law from the foregoing Findings of Fact, the Court finds:

I.

That the route district men and dealers were not and are not employees of the plaintiff; that said route district men and dealers were and are independent contractors, and that the profits earned by them from the resale of the newspapers purchased by them from plaintiff were not and are not taxable under the Federal [31] Unemployment Tax Act.

II.

That the plaintiff, Stockholders Publishing Company, Inc., is entitled to judgment against the defendant, Harry C. Westover, Collector of Internal Revenue, Sixth Collection District of California, in the sum of Seventeen Thousand Thirteen Dollars

and Four Cents (\$17,013.04), plus interest in accordance with the provisions of Title 28, United States Code, Section 2411, together with costs in the sum of \$.....

Dated this 14th day of July, 1954.

/s/ PEIRSON M. HALL.

Receipt of copy acknowledged.

Lodged July 9, 1954.

[Endorsed]: Filed July 14, 1954. [32]

District Court of the United States for the Central
Division of the Southern District of California
Civil Action No. 11879-P.H.

STOCKHOLDERS PUBLISHING COMPANY,
INC.,

Plaintiff,

vs.

HARRY C. WESTOVER, Former Collector of Internal Revenue, Sixth Collection District of California, JOHN DOE, and RICHARD ROE,

Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial before the above-entitled Court on the 29th day of June, 1954, the Honorable Peirson M. Hall, Judge, presiding, Binford & Binford, by Howard M. Binford, and James M. Caster appearing as attorneys for plaintiff Stockholders Publishing Company, Inc., and Laughlin E. Waters, United States

Attorney, by Robert H. Wyshak and Bruce Hochman, appearing as attorneys for the defendant Harry C. Westover, Former Collector of Internal Revenue, Sixth Collection District of California.

Both oral and documentary evidence was offered by the parties plaintiff and defendant, and the Court having heard and examined and given due consideration to such evidence, both oral [34] and documentary, and the cause having been duly submitted to the Court for its decision, and the Court having heretofore caused to be filed herein, its written Findings of Fact and Conclusions of Law and being fully advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed that plaintiff Stockholders Publishing Company Inc., a corporation, have and recover judgment against Harry C. Westover, Former Collector of Internal Revenue, Sixth Collection District of California, in the sum of Seventeen Thousand Thirteen Dollars and Four Cents (\$17,013.04), together with interest thereon in accordance with the provision of Title 28, United States Code, Section 2411, together with costs in the sum of \$19.00.

Dated this 14th day of July, 1954.

/s/ PIERSON M. HALL.

Approved as to form.

July .., 1954.

Receipt of Copy acknowledged.

Lodged July 9, 1954.

[Endorsed]: Filed July 14, 1954. [35]

[Title of District Court and Cause.]

Civil Action No. 14627-P.H.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause came on regularly for trial before the Court on the 29th day of June, 1954, the Honorable Peirson M. Hall, Judge, presiding, Binford & Binford by Howard M. Binford, and James A. Caster appearing as attorneys for the plaintiff Stockholders Publishing Company, Inc., and Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, by Laughlin E. Waters, United States Attorney, by Robert H. Wyshak and Bruce I. Hochman, appearing as attorneys for defendant.

Both oral and documentary evidence was offered by the parties plaintiff and defendant, and the Court having heard and examined and given due consideration to such evidence, both oral and documentary, and the cause having been duly submitted to the [37] Court for its decision, and the Court being fully advised in the premises, and after due consideration, now makes its Findings of Fact and Conclusions of Law, to wit:

Findings of Fact

I.

That each and all of the allegations in plaintiff's complaint are true.

II.

That all of the denials and allegations in defendant's answer are untrue except as to those allegations in defendant's answer which admit the truth of allegations contained in plaintiff's complaint.

III.

That it is true that jurisdiction is conferred by Title 28, Part IV, Chapter 85, Section 1340 of the United States Code.

IV.

That it is true that the plaintiff Stockholders Publishing Company, Inc., is a corporation organized under the laws of the State of Nevada, and has met all qualifications as a foreign corporation to transact business in the State of California, and that its principal place of business is in the City of Los Angeles, County of Los Angeles and State of California.

V.

That it is true that defendant Robert A. Riddell was at all times mentioned in plaintiff's complaint the Collector of Internal Revenue for the Sixth Collection District of California, and that the payments sought to be recovered by plaintiff in this action were made to him while he occupied the position of Collector of Internal Revenue, and were so paid to him as the Collector of Internal [38] Revenue.

VI.

That it is true that on the 12th day of July, 1950 taxes and interest in the sum of Eight Thousand Seven Hundred Ninety-six Dollars and Sixty-four

Cents (\$8,796.64) were paid to the defendant by plaintiff for the taxable year ending on December 31, 1945, pursuant to defendant's demand.

VII.

That it is true that a Claim for Refund was filed with the defendant on July 31, 1950, for the amount of the taxes to be refunded in the said sum of Eight Thousand Six Hundred Seventy-one Dollars and Fifty-one Cents (\$8,671.51), and on the ground that said taxes had been illegally collected by the said Robert A. Riddell, as Collector of Internal Revenue, Sixth Collection District of California, in that the route district men and dealers in newspapers published by the plaintiff were not employees of plaintiff but were independent contractors.

That it is true that "Exhibit A" attached to plaintiff's complaint is a true copy of the said Claim for Refund filed by plaintiff with the said Robert A. Riddell as Collector of Internal Revenue on July 31, 1950.

VIII.

That it is true that said Claim for Refund was not allowed or paid but was disallowed by the Commissioner of Internal Revenue. That it is true that the copy of a letter dated October 27, 1950, attached to plaintiff's complaint and marked "Exhibit B," is a true and correct copy of the letter wherein plaintiff was informed of the disallowance of its said claim.

IX.

That it is true:

(a) That in the year 1945 plaintiff was in the business of publishing a daily newspaper, the "Daily News," at Los Angeles, [39] California.

(b) That said plaintiff, as publisher and distributor of said "Daily News" sold newspapers to certain route district men and dealers at a wholesale price and was paid therefor by said route district men and dealers.

That it is true that said route district men and dealers resold or offered for resale, the newspapers so purchased by them, and that it is true that they retained any excess over the cost of said newspapers to them as their profits in the transaction.

(c) That the Commissioner of Internal Revenue erroneously found and determined that the route district men and dealers were employees of the plaintiff and not independent contractors. That it is true that the Commissioner of Internal Revenue erroneously determined that the excess of the said selling price of such newspapers by the route district men and the dealers over the wholesale price paid to plaintiff, was taxable under the Federal Unemployment Tax Act.

(d) That as a result of the Commissioner's error, the amount of Eight Thousand Six Hundred Seventy-one Dollars and Fifty-one Cents (\$8,671.51) was assessed by said Commissioner against the plaintiff for the year 1945, with interest thereon in

the sum of One Hundred Twenty-five Dollars and Thirteen Cents (\$125.13), making a total of Eight Thousand Seven Hundred Ninety-six Dollars and Sixty-four Cents (\$8,796.64). That it is true that the aggregate of said assessments, to wit, the said sum of Eight Thousand Seven Hundred Ninety-six Dollars and Sixty-four Cents (\$8,796.64), was duly paid by plaintiff on the 12th day of July, 1950, to and upon the demand of the defendant Robert A. Riddell, as Collector of Internal Revenue.

X.

That it is true that said route district men and dealers [40] were not employees of the plaintiff. That it is true that the said route district men and dealers were independent contractors. That it is true that the profits earned by them from the resale of newspapers, as aforesaid, are non-taxable under the Federal Unemployment Tax Act.

XI.

That it is true that the assessment and collection of said taxes and interest thereon in the total sum of Eight Thousand Seven Hundred Ninety-Six Dollars and Sixty-four Cents (\$8,796.64) was erroneous and illegal.

Conclusions of Law

And as Conclusions of Law from the foregoing Findings of Fact, the Court finds:

I.

That the route district men and dealers were not and are not employees of the plaintiff; that said

route district men and dealers were and are independent contractors, and that the profits earned by them from the resale of the newspapers purchased by them from plaintiff were not and are not taxable under the Federal Unemployment Tax Act.

II.

That the plaintiff Stockholders Publishing Company, Inc., is entitled to judgment against the defendant Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, in the sum of Eight Thousand Seven Hundred Ninety-six Dollars and Sixty-four Cents (\$8,796.64), plus interest in accordance with the provisions of Title 28, United States Code, Section 2411, together with costs in the sum of \$.....

Dated this 14th day of July, 1954.

/s/ PEIRSON M. HALL.

Receipt of Copy acknowledged.

Lodged July 9, 1954.

[Endorsed]: Filed July 14, 1954. [41]

District Court of the United States for the Central
Division of the Southern District of California

Civil Action No. 14627-P.H.

STOCKHOLDERS PUBLISHING COMPANY,
INC.,

Plaintiff,

vs.

ROBERT A. RIDDELL, Collector of Internal Revenue,
Sixth Collection District of California,
JOHN DOE, and RICHARD ROE,

Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial before the above-entitled Court on the 29th day of June, 1954, the Honorable Peirson M. Hall, Judge, presiding, Binford & Binford, by Howard M. Binford, and James M. Caster appearing as attorneys for plaintiff Stockholders Publishing Company, Inc., and Laughlin E. Waters, United States Attorney, by Robert H. Wyshak and Bruce I. Hochman, appearing as attorneys for the defendant Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California.

Both oral and documentary evidence was offered by the parties plaintiff and defendant, and the Court having heard and examined and given due consideration to such evidence, both oral and documentary, and the cause having been duly submitted to the [43] Court for its decision, and the Court

having heretofore caused to be filed herein, its written Findings of Fact and Conclusions of Law, and being fully advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed that plaintiff Stockholders Publishing Company Inc., a corporation, have and recover judgment against Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, in the sum of Eight Thousand Seven Hundred Ninety-six Dollars and Sixty-four Cents (\$8,796.64), together with interest thereon in accordance with the provisions of Title 28, United States Code, Section 2411, together with costs in the sum of \$19.00.

Dated this 14th day of July, 1954.

/s/ PEIRSON M. HALL.

Receipt of Copy acknowledged.

Lodged July 9, 1954.

[Endorsed]: Filed July 14, 1954.

Docketed and entered July 16, 1954. [44]

[Title of District Court and Cause.]

No. 11879-PH Civil

NOTICE OF APPEAL

To the Above-Named Plaintiff and to Its Attorneys
Binford & Binford, 1208 Hollingsworth Building,
Los Angeles, California, and James A. Caster,
714 W. Olympic Boulevard, Los Angeles,
California :

You, and Each of You, Are Hereby Advised that
the defendant, Harry C. Westover, Former Collector
of Internal Revenue, Sixth Collection District
of California, does hereby appeal to the Court of
Appeals for the Ninth Circuit from the order for
judgment for plaintiff entered June 29, 1954, and
from the judgment entered July 16, 1954, in the
above-entitled case.

Dated: This 26th day of August, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division;

BRUCE I. HOCHMAN,
Assistant United States
Attorney;

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant,
Harry C. Westover.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 26, 1954. [46]

[Title of District Court and Cause.]

No. 14627-PH Civil

NOTICE OF APPEAL

To the Above-Named Plaintiff and to Its Attorneys
 Binford & Binford, 1208 Hollingsworth Building,
 Los Angeles, California, and James A. Caster,
 714 W. Olympic Boulevard, Los Angeles,
 California:

You, and Each of You, Are Hereby Advised that the defendant, Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, does hereby appeal to the Court of Appeals for the Ninth Circuit from the order for judgment for plaintiff entered June 29, 1954, and from the judgment entered July 16, 1954, in the above-entitled case.

Dated: This 26th day of August, 1954.

LAUGHLIN E. WATERS,
 United States Attorney;

EDWARD R. McHALE,
 Assistant United States Attorney, Chief, Tax Division;

BRUCE I. HOCHMAN,
 Assistant United States
 Attorney;

/s/ BRUCE I. HOCHMAN,
 Attorneys for Defendant,
 Robert A. Riddell.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 26, 1954. [48]

[Title of District Court and Cause.]

No. 11879-PH Civil

ORDER EXTENDING TIME TO DOCKET
CAUSE ON APPEAL

Upon motion of defendant-appellant, Harry C. Westover, Former Collector of Internal Revenue, Sixth Collection District of California, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the appeal in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 24th day of November, 1954.

Dated: This 30th day of September, 1954.

/s/ PEIRSON M. HALL,

United States District Judge.

Presented by:

/s/ BRUCE I. HOCHMAN,

Assistant United States

Attorney.

[Endorsed]: Filed September 30, 1954. [53]

[Title of District Court and Cause.]

No. 14627-PH Civil

ORDER EXTENDING TIME TO DOCKET
CAUSE ON APPEAL

Upon motion of defendant-appellant, Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the appeal in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 24th day of November, 1954.

Dated: This 30th day of September, 1954.

/s/ PEIRSON M. HALL,
United States District Judge

Presented by:

/s/ BRUCE I. HOCHMAN,
Assistant United States
Attorney.

[Endorsed]: Filed September 30, 1954. [54]

In the United States District Court, Southern
District of California, Southern Division
No. 11879-PH Civil

Honorable Peirson M. Hall, Judge Presiding.

STOCKHOLDERS PUBLISHING COMPANY,
INC.,

Plaintiff,

vs.

HARRY C. WESTOVER, Etc., Et Al.,

Defendants.

No. 14627-PH Civil

STOCKHOLDERS PUBLISHING COMPANY,
INC.,

Plaintiff,

vs.

ROBERT A. RIDDELL, Etc., Et Al.,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiffs:

BINFORD and BINFORD, By
HOWARD M. BINFORD, Esq.; and
JAMES A. CASTER, Esq.

For the Defendants:

LAUGHLIN E. WATERS,
United States Attorney;
BRUCE I. HOCHMAN,
Assistant United States Attorney.

June 29, 1954; 11:00 A.M.

The Court: We will have the morning recess and then I guess you are ready to go ahead in the Stockholders Publishing matter?

Mr. Hochman: Yes, your Honor.

Mr. Binford: Yes.

The Court: Do you have any pre-trial memorandum or statement or opening statement or anything here?

Mr. Binford: We have an opening statement that the plaintiffs will make, but an examination of the pleadings will disclose that all issues have been resolved except whether or not the tax was illegally collected, assessed, and collected, or not.

The Court: And which turns on the question as to whether or not the newspaper distributors were independent contractors or employees.

Mr. Binford: Principally, that is right. And the rest of the pleadings, the Government pleadings admit all other pertinent allegations.

The Court: Very well.

You do not have any statement, Mr. Hochman?

Mr. Hochman: No, your Honor.

The Court: Very well. We will have the morning recess.

(Short recess.) [5*]

The Court: I do not think that there has been any order for the consolidation of these two cases for all purposes. Is there any reason why such an order should not be made?

Mr. Hochman: No, your Honor.

Mr. Binford: There is not, your Honor.

The Court: Both counsel agree to it?

Mr. Hochman: So agreed.

Mr. Binford: Yes, your Honor.

The Court: Upon the stipulation of counsel a minute order will be made consolidating Case No. 11879 and Case No. 14627 for all purposes.

Now you say you have an opening statement, Mr. Binford?

Mr. Binford: Mr. Caster and I will be trying this case jointly and Mr. Caster is prepared to make an opening statement at this time.

The Court: Very well.

Opening Statement on Behalf of the Plaintiff

Mr. Caster: These two cases, the Stockholders Publishing Company vs. Westover and the Stockholders Publishing Company vs. Riddell, involve the same facts. The only difference is the names and the dates and the amounts involved. Both actions are brought to recover Federal unemployment taxes which the plaintiff alleges were illegally collected.

The first case, the case against Westover, covers the years 1943 and 1944, and the second case covers the year 1945. [6]

It involves the taxes that were paid under the Federal Unemployment Tax Act based on workers who were engaged in distributing the Daily News which is published by the plaintiff corporation. These men were designated as route district men and dealers.

It is the contention of the plaintiff that the route

district men and dealers are independent contractors and that as such their earnings are not the basis for a tax under unemployment insurance.

The Court: Are route district men and dealers the same men or are there two classes?

Mr. Caster: There are two classes of men. They are very similar.

With the exception of the allegation that the taxes are illegally collected, the Government has admitted practically all of the allegations that are submitted.

In order to get this matter clearly before the court, it might be well at this time to review briefly the so-called social security taxes.

The Court: Just before you do that, the Government by its answer has admitted that the Stockholders Publishing Company is a corporation and all of your jurisdictional allegations, that the taxes and interest were assessed and paid, that the claim for refund was filed at the time alleged and it was denied, and that this suit is brought within the [7] statutory period, and then the refusal of the refund?

Mr. Caster: That is correct.

The Court: Very well.

Mr. Caster: There are three so-called social security taxes, or tax laws.

The first has to do with the tax that is levied and collected by the State. That tax is a tax on the employees which is required to be withheld by the employer and after contributing his portion of the tax is paid to the State.

The Court: Do you mind if I interrupt you?

Mr. Caster: No, that is all right.

The Court: I see that these taxes involve the years 1943, '44, and '45. I take it there have been amendments of the statute since those dates, so in giving me the statute will you give me the applicable statute and the statutory reference?

Mr. Caster: I will briefly outline these laws as they were in effect for the years 1943, '44, and '45.

The Court: Very well. And give me the statutory reference.

Mr. Caster: Yes.

As I stated, the State levies a tax on the employee which is required to be withheld by the employer and the employer is also taxed on the payroll for the salary, wages and commissions of the employee, and that is required to be paid [8] by the employer to the State of California.

In connection with the district men and dealers, the State of California has ruled that they are not employees and as a result no tax has been levied against the employee and the employer has not paid that tax.

The second social security law is the Federal Old Age Benefit Act. That likewise imposes a tax on the employee which is required to be withheld by the employer and after paying his contribution must pay the amount due the State each quarterly period.

The Court: To the State?

Mr. Caster: To the Federal Government, I should say.

That tax has never been imposed on the route district men today and the dealers and the Government has never asked that that tax be paid by this taxpayer.

The third social security law is the one that is involved in this action. It imposes a tax on the employer alone and is based on the first \$3,000 of wages or salaries that have been earned by employees up to the first \$3,000.

The Court: This is the unemployment tax?

Mr. Caster: That is the Federal unemployment tax.

That tax is a 3 per cent tax with a 90 per cent credit when one complies with the requirements of the State law in paying the tax that is due the State.

Now from this outline it can reasonably be noted that if [9] these men are employees then there may be a tax due, but if they are independent contractors then the plaintiff, as the plaintiff alleges, they are exempt from paying this tax.

There is, however, a matter that I want to call to the attention of the court at this time, and that is regarding the 90 per cent credit that I mentioned.

The largest tax that can be assessed by the State against an employer is 2.7 per cent. That was true in the years in which this tax is involved and it is true today.

But the State may from time to time reduce the percentage depending on the circumstances and even to the extent of only 1 per cent, or $\frac{1}{2}$ per cent or even to zero, which it does in a great many cases.

But when that tax is reduced the credit that is allowed by the Federal Government on the social security tax is 90 per cent of what the tax would have been had they been obligated to pay the full 2.7 per cent. But in this particular case the Government has allowed no credit and in that we consider that they have erred in computing the tax.

With reference to that provision of the law I cite Section 1601(b) of the Internal Revenue Code.

The Court: Is it the same now as it was then?

Mr. Caster: It is the same now as it was then.

The Court: You mean there have been no amendments?

Mr. Caster: Not to that phase of the law. [10]

It is said that in administering the social security laws if there is any variation or any leaning one way or the other that it should be toward the employee because it is supposed to be a benefit to the working man.

But in this instance there can be no benefit obtained by these route district men or dealers from this tax. The Federal Unemployment Tax Act creates a vast fund from which the Federal Government pays to the State that has a social security law and enables them to pay from that fund the unemployment to the people who are covered. But in this case the district men and dealers are not covered by the Unemployment Tax Act.

The Court: Of the State?

Mr. Caster: Of the State.

The Court: At all?

Mr. Caster: No, not at all.

The Court: So there is no credit?

Mr. Caster: There is no credit. They have allowed no credit.

The Court: They have allowed no credit?

Mr. Caster: They have allowed no credit, but we contend that even if there is a tax they should have allowed the credit just the same.

The Court: You mean even if there is no tax?

Mr. Caster: That is right. [11]

The Court: In other words, your position is that there being no tax you are entitled to the maximum credit?

Mr. Caster: That is right.

But the point is that the district men and dealers could never receive the benefit from the tax that the Stockholders Publishing Company has been required to pay because they aren't covered by the State and since they aren't covered by the State there is no possibility that they could ever receive any unemployment insurance because——

The Court: From this money?

Mr. Caster: From this money or any money. The Federal Government doesn't pay to the covered employee.

The Court: In other words, it only pays to those who are covered by the State law?

Mr. Caster: No, it doesn't even pay them. It only pays to the State and the State in turn pays to those who are covered. So it is impossible for the employees here, or the district men and dealers, to ever receive any benefit from the tax that is being paid.

The Court: Very well.

Mr. Caster: This court knows that there is a tendency from time to time for one department of the Government to infringe on the rights and duties of some other department of the Government, and that is exactly what has happened in administering the social security laws. And that resulted in a [12] big debate in Congress in 1948.

The Government took the position that the social security laws applied to people whether they were independent contractors or employees and as a result Congress passed Public Law No. 642—that was in the 80th Congress and was enacted on June 14, 1948.

I cite that law as Congressional Service, Volume I, 1948, page 449. And in enacting that law it was discussing the question of who was and who was not an employee, and as a result of that law, Section 1426(d) and Section 1607(i) of the Internal Revenue Code was amended.

That amendment inserted before the period, at the end of each, the following—they were discussing the term “employee”—“such term does not——”

The Court: Just a minute now. I found 1607.

Mr. Caster: It is 1607(i).

The Court: Is that in parentheses, little “i”?

Mr. Caster: Yes, little “i.”

The Court: Yes?

Mr. Caster: And that is the amendment that affects the Internal Revenue Code with reference to Federal unemployment and it is directly in point here.

The other was amended but that has reference to the old age pension so I think you are interested principally in 1607(i). [13]

The Court: Go ahead:

Mr. Caster: "But such term (meaning the employee) does not include (1) any individual who under the usual common law rules applicable in determining the employer and employee relationship has the status as independent contractor or (2) any individual except an officer of a corporation who is not an employee under such common law rules." Then (b) under that amendment:

"The amendment made by Section——"

The Court: Just a moment. That is 1426(d) ?

Mr. Caster: 1426(d) and 1607(i). I don't think you are interested in 1426 because it doesn't apply here.

The Court: What are you going to read from now ?

Mr. Caster: The same thing. This is the amendment that was made by Public Law 642 to both of these sections, 1426(d) and 1607(i). They both apply the same. In fact, these laws are so correlated that whatever is true of one is principally true of the other.

The Court: Very well. Now this is 1426(d) ?

Mr. Caster: That is right.

The Court: The term employee ?

Mr. Caster: That is right.

Then in 1426(d) and 1607(i) under (b) of that amendment:

“The amendment made by Subsection (a) shall have [14] the same effect as if——”

The Court: Subsection (a) of what? You were talking about 1426(d) and 1607(i) and now you are talking about Subsection (a). Of what?

Mr. Caster: Of this Public Law 642, page 449. Section (b) provides that the amendment made by Subsection (a) shall have the same effect as if included in the Internal Revenue Code on February 10, 1939, the date of its enactment.

In other words, the Congress is saying that what we meant, or what we mean now and what we meant when the law was enacted, that the employer-employee relationship is to be determined by common law rules and the status of an independent contractor is not now and never has been the subject of the collection of social security tax.

Now the application of the social security taxes is more than merely levying and collecting a tax; it imposes upon the employer an obligation to keep records. Those records must show the people who he employs and the time that they work, the amount of money that he pays them, so that the tax can be determined.

But with reference to district men and dealers it is impossible for the employer to keep that information. He has no knowledge of how much money the dealers make because they buy their papers from him and sell them. They buy them at a wholesale price and sell them at something higher than [15] that wholesale price that they paid. The taxpayer

in this case has no means of determining how much money they make.

Now when all the evidence is in we feel confident that this court will recognize that these district men and dealers are not employees and not subject to the tax but that they are independent contractors.

The Court: Thank you.

Do you have a statement to make, Mr. Hochman?

Mr. Hochman: Just a short statement, your Honor.

Opening Statement on Behalf of the Government

Mr. Hochman: Your Honor, the Government contends in this case here in question that the people involved are employees of the Stockholders Publishing Company in both cases before this court.

Relative, your Honor, to what the State of California has ruled, if it please the court, we are seeking an independent determination in this court as to what this court feels this situation bespeaks. You have here a chicken-and-an-egg situation. Perhaps the State of California didn't act because the Federal courts did not act, and for the Federal court not to act because the State court may not have acted is to run in a merry-go-round.

Your Honor, the Government wishes that these facts speak for themselves and we want an independent determination as to whether these individuals are independent [16] contractors or employees.

Further, your Honor, in the consideration of the facts—and it gets down basically to a fact consideration under common law principles well known

to this court—we want a consideration as to policy, scope and intent of the statute under which we are operating.

The Court: I take it from what you have said up to now you concede that if they are independent contractors as a matter of fact the plaintiff is entitled to recover its refund?

Mr. Hochman: Yes, your Honor.

The Court: Well, that seems to be the sole question.

Mr. Hochman: There is no purpose to confound or confuse an issue. That basically is this case.

The Court: Very well.

Mr. Hochman: But in the determination, your Honor, of whether they are independent contractors or whether they are employees in employing the common law principles—and this bespeaks a certain amount of difficulty in all cases—the policy, import and intent of the statute is, the Government contends, very material. We have a statute in which people are to be benefited. To argue that there is no benefit because the people will not benefit because they receive nothing from the State and the Government only gives the money to the State is to beg a question. If the tax is proper then by [17] petitioning the State the money is paid and they can get it.

As I say, the case would only be compounded by going into State matters. However, the independent consideration here will go a long way to determine this issue.

The Court: Then, if I understand you correctly,

the legal question is governed by the amendment of 1948 which defines the word "employee"?

Mr. Hochman: Yes, your Honor.

The Court: Very well.

Mr. Hochman: The facts will reveal, your Honor, in the plaintiff's case, and if not in the plaintiff's case then in the defendants' case, that the plaintiff here has knowledge of what the dealers make by simple computation.

Not only do they know what they sell the papers for, they know what the papers are sold for, and they know what they are sold for to the newsboys and how much the newsboys make. They know therefore the maximum amount the man makes in terms of number of papers he purchases and the profit per paper.

The Court: Do they know the number of hours that he works?

Mr. Hochman: Well, your Honor, there will be a minimum number of hours that he must work relative to contracts that will be in evidence, a collective bargaining agreement of the Guild with the plaintiff. [18]

There is also, as the court will see, individual contracts and there must be a reconciliation of the two contracts, an unfortunate situation which will pose certain difficulties.

The evidence, the Government contends, will reveal that these men are within the control of the Stockholders Publishing Company and that the common law principles and the policy of the statute, when considered in the light of the evidence

(Testimony of Arthur G. Pollock.)

will, the Government contends, lead this court to a conclusion that these men are not independent contractors.

The Court: Very well. Call your witnesses.

Mr. Binford: Mr. Pollock, please.

ARTHUR G. POLLOCK

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: Arthur G. Pollock; P-o-l-l-o-e-k.

The Clerk: And your address?

The Witness: 658 Canterbury Road, San Marino.

Direct Examination

By Mr. Binford:

Q. Mr. Pollock, what is your occupation?

A. At the present time I am business manager.

Q. Of what?

A. Of the Daily News, which is owned by the Stockholders Publishing Company. [19]

Q. How long have you been employed by the Stockholders Publishing Company?

A. Ever since it began.

Q. And that was when? A. 1929.

Q. And since 1929 what various occupations and jobs have you had with Stockholders Publishing Company?

(Testimony of Arthur G. Pollock.)

A. Assistant auditor, and then as auditor of the Huntingington Park Signal, which was a wholly owned subsidiary of the Stockholders Publishing Company, and then business manager of the Signal then auditor of the Post Publishing Company which was controlled by the Stockholders Publishing Company, and then assistant auditor of the Post and the Stockholders Publishing Company later auditor of both, and then business manager of the Stockholders Publishing Company, circulation director for a period of approximately a year and a half, and then business manager. I held the position of treasurer for a period of time and assistant secretary. I am now assistant secretary and business manager.

Q. Well, during this approximately 25-year period you therefore have held enough varied positions so that you are well acquainted with the general operation of the newspaper business, I take it?

A. That is right.

Q. And are you familiar with the over-all operation of [20] the circulation department of the Daily News?

A. The over-all picture, yes.

Q. And is that over-all picture the same substantially today or different than during 1943, '44 and '45?

A. Substantially the same now as in '43, '44, and '45.

Q. Now tell us about the operation and the distribution of the Daily News as conducted by route

(Testimony of Arthur G. Pollock.)

district men and dealers. How do they operate? What do they do? How does it work?

Mr. Hochman: May it please the court, I object to that as too general. I would like to pinpoint it as to the year.

Mr. Binford: During 1943, '44 and '45. He has already said it was substantially the same today.

Q. But during the years '43, '44, and '45, Mr. Pollock.

A. Well, during that period route men and dealers purchased their papers at varied wholesale rates. They in turn resell those papers to the carrier boys. The carrier boys in turn sell them at retail to the subscriber.

The Court: There was a period of time when the Daily News did not have street sales or you did not make delivery?

The Witness: No, there has never been a time when we didn't have both.

The Court: Is that right?

The Witness: We have always had street sales and home delivery. [21]

Q. (By Mr. Binford): Now you mentioned that you sell the papers initially to the dealers and route district men——

The Court: What do you mean by "route district men"? What is a route district man?

The Witness: Well, that is the term that has been used for those individuals that we have sold the papers to primarily in the city.

The dealers have been the men that have served

(Testimony of Arthur G. Pollock.)

the areas in what we call the 10-mile zone and outside of that, and that terminology is more or less for Audit Bureau circulation standards.

The Court: The Audit Bureau circulation being a national organization?

The Witness: That is right.

The Court: Which makes an audit on the actual circulation for the purpose of fixing advertising rates?

The Witness: That is right.

The Court: And that term "route man" and "dealers" is a term which is commonly used in all newspapers in this area?

The Witness: Well, I would say so. However, I wouldn't like to state definitely what the other papers do call them.

The Court: Now a route district man, I take it is somebody who has, say, the West Adams district?

The Witness: That is correct. [22]

The Court: In other words, he buys papers from you for resale to carrier boys in the West Adams district?

The Witness: That is correct.

The Court: So the city is divided into districts?

The Witness: That is correct.

The Court: Then the dealers are outside of those districts?

The Witness: That is right.

The Court: And the dealers include people to the ultimate extent of your circulation?

The Witness: Yes.

(Testimony of Arthur G. Pollock.)

The Court: Which is to where, Phoenix?

The Witness: No, we don't have anything in Phoenix. I would say Ontario, Santa Ana, Santa Monica, Long Beach, all the surrounding territory.

The Court: Within Los Angeles County?

The Witness: Well, even outside of Los Angeles County; in Orange County, even to Ventura.

The Court: San Diego?

The Witness: I am not sure at the present time what our setup is in San Diego.

The Court: Very well.

Q. (By Mr. Binford): Now you mentioned that you sell to the dealers and route district men at varying wholesale prices. Will you [23] explain that, and why?

A. We have no set rate for the reason depending on conditions in that particular area. One area, for instance, may be scattered as to the subscribers, which would take more time, they would be able to handle less papers, the terrain may be hilly, so it may be necessary even to have a car route where a boy on a bicycle couldn't deliver.

All those factors are taken into consideration.

The Court: And in those cases they buy their papers wholesale from you at lesser rates?

The Witness: That is right.

Q. (By Mr. Binford): Then they, as you testified, resell the papers to the carrier boys. Do you fix the price at which they should sell these papers to the carrier boys?

(Testimony of Arthur G. Pollock.)

A. No, those prices are fixed to a degree by consultation. There is a range that we suggest in order to, shall I say, protect the carrier boys from some unscrupulous dealer who might take advantage of them.

Q. Do the district men in fact sell to carrier boys, different district men, at different prices?

A. Oh, definitely.

Q. And why is that?

A. Well, I think that would be for the same reason that we have different prices to the dealers. It is depending [24] on the terrain and the number of subscribers. A good example would be of a new subdivision being opened up, and you want to start a route in there. Well, you have to start from zero. That boy is going to have to be given something for his efforts, and a boy with ten papers, his rate is certainly going to be different from that of a boy with 50 or more.

Q. Now a boy delivers the paper to the subscriber and supposing a subscriber didn't pay his bill and moved away. Who stands the loss if the money is never collected?

A. That would be between the dealer and the carrier boy.

Q. Does the Daily News stand the loss in an event?

A. Not unless the dealer would come in and negotiate something.

The Court: When the route district men and the dealers buy, they pay you direct?

(Testimony of Arthur G. Pollock.)

The Witness: Yes, sir, on a monthly basis.

The Court: You bill them and they pay you?

The Witness: We bill them for the number of papers they draw each month, but they can change their draw daily. Whatever they draw each month is totaled at the end of the month and they are billed for that at whatever their rate is.

Q. Then it is up to them to collect ultimately from either the newsboy or the subscriber?

A. That is right. [25]

(Exhibiting document to counsel.)

Q. (By Mr. Binford): Mr. Pollock, I will show you a form of agreement——

The Clerk: Plaintiff's Exhibit 1.

The Court: Plaintiff's Exhibit 1 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Binford): I notice it is dated in April, 1943. I will ask you to examine that agreement and tell us whether or not that agreement is the agreement that the Daily News signed between it and the route district men and dealers and was in effect all during '43, '44, and '45.

A. That is the agreement that was signed and was in effect during those three years.

Mr. Binford: We offer that as Plaintiff's Exhibit 1.

The Court: Admitted in evidence.

(Testimony of Arthur G. Pollock.)

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 1.)

The Court: This printed form, you mean, is the agreement?

The Witness: That is right.

The Court: This is an executed agreement—

Mr. Binford: That is an original agreement.

The Court: —by Mr. Betancourt. [26]

Mr. Binford: The fact that it is signed is not pertinent here. The purpose of its offer is merely to show the form that was in effect during those years.

The Court: Very well.

Q. (By Mr. Binford): Now under the provisions of that agreement you require a bond of some sort to be put up by the dealers and route district men, is that correct? A. Correct.

Q. How much is that bond, and tell us about the bond, what it is for.

A. Well, the bond varies of course in amount and it is arrived at basically on the basis of one and one-half months paper bill. It is used as collateral against the non-payment of the circulation bill.

Q. And what is it, is it a cash bond or is it securities or does it vary depending upon a particular district man or dealer?

A. Well, I would say with the exception of probably two or three cases it is a cash bond.

Q. Now a dealer orders a certain number of

(Testimony of Arthur G. Pollock.)

papers per day with you, is that correct, of the Daily News? A. That is correct.

The Court: They vary from day to day?

The Witness: That is correct. [27]

Q. (By Mr. Binford): It may be up or down day by day? A. That is right.

Q. Supposing he orders ten too many on a given day and you billed him at three and a half cents per paper. Does he lose that 35 cents or is he permitted to return these papers to the Daily News?

A. Well, now, when you say three and a half cents, you mean whatever his rate is?

Q. Whatever his rate is.

A. Whatever he orders he pays for.

The Court: Regardless of whether he sells them or not?

The Witness: That is right.

The Court: Has the plaintiff in the case at any time carried workman's compensation insurance on any of the dealers or route district men?

The Witness: Yes, I believe they have from time to time. I couldn't swear to that.

The Court: Did they make it a practice?

The Witness: In those years I wouldn't like to say definitely whether they did or didn't. The reason for it has been the fact that it has been practically impossible to determine from a workman's compensation as to whether we would be liable or not.

The Court: In other words, you carry it as a measure [28] of—

(Testimony of Arthur G. Pollock.)

The Witness: Self-protection.

The Court: —self-protection?

The Witness: Yes.

The Court: The same as the schoolteacher carries liability insurance for injury to a pupil?

The Witness: But I couldn't say during those years whether we were paying it at that time or not.

Q. (By Mr. Binford): Now with respect to the route district men and dealers, do you make a deduction—if that were possible—for social security for these men? A. No.

Q. Men? A. No.

Q. And do you deduct any sort of withholding tax, withholding on income from these men?

A. No.

Q. And do you pay to the State of California any amount of money for unemployment?

A. No.

(Exhibiting document to counsel.)

Mr. Binford: I at this time offer a letter, which I will presently identify with the witness, dated February 13, 1947, addressed to Stockholders Publishing Company, Inc., [29] and signed by H. E. Minear, Principal Auditor, State of California, Department of Employment.

The Clerk: Plaintiff's Exhibit No. 2.

The Court: For identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

(Testimony of Arthur G. Pollock.)

Mr. Binford: I will ask that that be shown to the witness and ask him to read that letter.

Mr. Hochman: Your Honor, I object to the reading of the letter.

Mr. Binford: I am sorry. I didn't mean out loud. Read it to himself.

The Witness: (Examining exhibit.)

The Court: Do you have other documents, Mr. Binford, which you expect to produce?

Mr. Binford: Well, I do have an income tax form but I am sure counsel for the Government will not object to it.

The Court: Have you shown your documents to counsel?

Mr. Binford: Yes, I have, your Honor.

The Court: Do you have documents that you expect to rely on?

Mr. Hochman: Yes, your Honor.

The Court: Have you exhibited them to Mr. Binford?

Mr. Hochman: Yes, your Honor. They are basically his documents. [30]

The Court: Very well. We will recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m., of the same date.) [31]

June 29, 1954; 2:00 P.M.

The Court: Any ex parte matters?

The Clerk: Yes, your Honor.

(Other court matters.)

The Court: Very well. We will resume with the Stockholders Publishing Company matter.

Mr. Binford: Mr. Pollock, will you resume the stand.

ARTHUR G. POLLOCK

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Mr. Binford: May I have the last statement Mr. Reporter, that I made? I don't know whether I made an offer of Plaintiff's Exhibit 2 or not.

The Court: No, you did not. You had just asked him to read it and he was reading it when I recessed.

Direct Examination

(Continued)

By Mr. Binford:

Q. Have you completed the reading of it?

A. I have.

Mr. Binford: At this time I offer Plaintiff's Exhibit 2 for identification into evidence as Plaintiff's Exhibit 2.

Mr. Hochman: I object to that, your Honor. The general ground is that it is immaterial.

The Court: There is no foundation laid for [32] it.

Mr. Hochman: It is not the foundation I have objection to.

(Testimony of Arthur G. Pollock.)

The Court: You waive the foundation?

Mr. Hochman: Yes, your Honor.

The Court: Very well. And by that I take it you concede that the letter was written on or about the date it bears from the parties it purports to be from and received by the parties to which it is addressed?

Mr. Hochman: Yes, sir. I assured counsel I would not object to the foundation.

However, as to its materiality, it is a letter from the State of California, Department of Employment, and the Government contends, your Honor, it has no materiality to the case of the Stockholders Publishing Company vs. the United States of America.

The Court: Let me see the document.

(The exhibit referred to was passed to the court.)

Mr. Binford: I was merely going to state the letter is not offered for the purpose of proving whether or not the parties are independent contractors or employees. That is the problem before the court.

It has pertinency for two reasons: the principal reason of course being that it is incumbent upon the plaintiff to show that we did not pay any tax to the State of California, unemployment tax, if we are entitled to credit under Section [33] 1601(b) of the Internal Revenue Code. That is the principal purpose of offering the letter.

(Testimony of Arthur G. Pollock.)

The Court: The objection is overruled. It is admitted in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Binford: Mr. Clerk, will you mark this Plaintiff's Exhibit 3 for identification, and hand it to the witness.

The Clerk: Plaintiff's Exhibit 3 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Binford): Mr. Pollock, I show you a letter from the Internal Revenue Department, dated February 14, 1945, and ask you to read it to yourself. A. (Examining exhibit.)

Mr. Binford: Your Honor, inasmuch as Mr. Hochman has agreed not to object on foundation, I will not try to lay a foundation but I now offer the letter in evidence as Plaintiffs' Exhibit 3.

Mr. Hochman: Your Honor, I object to that letter. Not only is it immaterial to the issues before this court, but further, your Honor, it is what we may term an intermediate letter in the sense that the final liability in which these taxes were assessed and paid are subsequent to that letter [34] and that intermediate letters by agents of the Government do not bind the Government. In addition it concerns a different matter.

For those two reasons the Government objects

(Testimony of Arthur G. Pollock.)

to the admissibility into evidence of Plaintiff's Exhibit No. 3 for identification purposes.

The Court: Overruled. Admitted.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. (By Mr. Binford): You have testified and, as shown by the letter from the State of California, that you have paid no unemployment tax to the State of California on the dealers and route district men. Did the Stockholders Publishing Company ever receive any credit from the United States Government by reason of the fact that they were not required to pay any tax to the State of California?

Mr. Hochman: I object to that question, your Honor. It is outside of the pleadings. There is no allegations made in the pleadings, in the complaint, in the alternative for any credit.

Mr. Binford: We are not asking for credit in that respect.

Mr. Hochman: An issue has been made here, an offer of proof is being made here, outside I think of the purview, [35] even a broad purview, of the complaint.

The Court: I do not think so. They sued to get their whole money back and that is one of the grounds on which they say they are entitled to it.

Mr. Hochman: They didn't say, your Honor, in the complaint.

The Court: You do not have to spell out your whole legal theory in the complaint, according to

(Testimony of Arthur G. Pollock.)

the Ninth Circuit. According to me, before I was overruled by the Ninth Circuit, you did.

Mr. Hochman: Perhaps we will agree with the court later on.

Mr. Binford: Will you read the question to the witness, Mr. Reporter?

(The question referred to was read by the reporter as follows: "Q. You have testified and as shown by the letter from the State of California, that you have paid no unemployment tax to the State of California on the dealers and route district men. Did the Stockholders Publishing Company ever receive any credit from the United States Government by reason of the fact that they were not required to pay any tax to the State of California?")

The Court: I think that that calls for his conclusion. [36] I think he can testify to whether he received any memorandum, notification, notice or anything of that nature indicating the United States has given that.

Q. (By Mr. Binford): Did you ever receive from the United States Government any memorandum or notice from the Government that you would be or were going to be given credit for any part of the tax which you paid?

Mr. Hochman: Your Honor, relative to the first part of this question as to the State of California and relative to the latter part the court has over-

(Testimony of Arthur G. Pollock.)

ruled the Government on this but could we have a continuing objection?

The Court: Yes, you may have a continuing objection to the entire line of questioning.

Mr. Hochman: Thank you.

The Witness: No.

Q. (By Mr. Binford): Getting back for a moment to the operation that you testified to this morning that the route district men and dealers, do some or any of them or all of them, have offices where they conduct their business?

A. I understand some do and some don't.

Q. As to those that do, does the Stockholders Publishing Company pay the rent for the offices?

A. No. [37]

Q. Are these men, or do these men, either dealers or route district men or both, occasionally hire helpers or assistants?

A. Well, I understand that they do.

Q. Does the Daily News or the Stockholders Publishing Company pay the salary of the assistants? A. No.

Q. In other words, they can hire assistants without your knowledge, I take it from your testimony?

A. Yes, that is true.

Q. Do you furnish any equipment to the route district men or dealers in order to aid them in their distribution of the newspapers?

A. Not as to the distribution. We do furnish racks.

Q. But you don't furnish things like automo-

(Testimony of Arthur G. Pollock.)

biles or other equipment? A. No.

Q. Some men have racks and some do not, is that correct?

A. Your home delivery have no racks.

Q. Some of the route district men do have racks?

A. Not the home delivery.

Q. But not the home delivery? A. No.

Q. Now if a man puts papers on the rack and some citizen [38] steals the paper, who loses the money?

A. Well, he still pays for the papers that were billed to him.

Q. So he loses the money?

A. He loses the money.

The Court: In connection with the resale or distribution of the papers by the route district men or the dealers or the carriers, are they under your instructions or directions in any manner as to how they shall conduct their sales?

The Witness: The thing that we stress is that they are responsible for results.

The Court: I mean, do you tell them, "You go and canvass this block this week," or "Canvass this block the next week"?

The Witness: No. We recommend.

The Court: Or do you tell them to go up and make a pitch that this is a lot better newspaper than the Mirror, and so forth?

The Witness: Well, that may be given to them in general as a suggestion. In other words, to furnish promotion material.

(Testimony of Arthur G. Pollock.)

The Court: Yes?

The Witness: But they are not instructed to carry out any particular line of questioning nor promotion or sales talk, nor are they instructed to solicit any certain area at [39] any given time.

The Court: Very well.

Mr. Binford: You may examine, counsel.

Cross-Examination

By Mr. Hochman:

Q. Mr. Pollock, did you ever work in the circulation department, sir, in any capacity?

A. As circulation director?

Q. Yes. A. Yes, sir.

Mr. Hochman: Your Honor, if we may take this out of order, the Government has certain exhibits which it wishes to use and submit into evidence. There has been a stipulation between the parties relative to the foundation and I trust its materiality.

Mr. Binford: I stipulated to the foundation. I won't stipulate to the materiality, but certainly as to the foundation.

Mr. Hochman: May they be marked now, your Honor?

The Court: A, B, and C?

Mr. Hochman: A, B, and C.

The Clerk: Government's Exhibits A, B, and C for identification.

(Testimony of Arthur G. Pollock.)

Mr. Binford: May I suggest in marking them that you use the earliest date for the A and the next earliest, and [40] so forth?

Mr. Hochman: That has been done.

Mr. Binford: Thank you.

(The documents referred to were marked Defendants' Exhibits A, B, and C for identification respectively.)

Q. (By Mr. Hochman): Mr. Pollock, I show you Defendants' Exhibits A, B, and C for identification purposes and ask you, sir, to identify those for us, if you will.

A. These are three contracts between the Los Angeles Newspaper Guild and the Daily News.

Q. What are the dates covered?

A. A covers November 5, 1941, to November 4, 1942; B covers March 29, 1943, to March 29, 1944; C covers November 27, 1944, to November 27, 1945.

Q. Who are parties to those contracts?

A. The Los Angeles Newspaper Guild and the Daily News.

Q. Does the Guild represent the route district men?

A. Yes, they do. There is a letter right in the front of this Exhibit A.

Q. Is there the same letter in front of B and C, sir?

A. I don't think that letter appears again.

Q. Then am I to understand that Plaintiff's Exhibit No. 1, which is in evidence, which is an agree-

(Testimony of Arthur G. Pollock.)

ment between the Daily News, the Stockholders Publishing Company— [41]

The Court: A?

Mr. Hochman: No, your Honor. There was an agreement.

The Court: Yes, Exhibit No. 1.

Mr. Hochman: Yes.

The Court: Very well.

Mr. Hochman: Strike that, Mr. Reporter.

Q. In effect, Mr. Pollock, is it not true that there are two agreements in which these route district men are involved?

Mr. Binford: Just a moment. I object to that as calling for a conclusion of the witness. He has already testified that the Newspaper Guild and the Daily News are parties to a collective bargaining agreement. We have in evidence a specific agreement between the Daily News and the various district men and dealers.

The Court: I understood his question to be as to whether or not there was not another agreement like Exhibit 1.

Mr. Hochman: No, your Honor. This has to do with whether or not—

The Court: The question is an argument with this witness as to whether that Exhibit 1 and Exhibit A are the same?

Mr. Hochman: No. I wish to know whether the men are governed—I wish to know in his capacity whether or not the men are covered by both contracts.

(Testimony of Arthur G. Pollock.)

Mr. Binford: That calls for a conclusion of the witness. [42]

The Court: Objection sustained.

The Witness: May I read—

The Court: No. The objection is sustained.

Q. (By Mr. Hochman): Mr. Pollock, does the Daily News or Stockholders Publishing Company carry any insurance for newsboys, pay any money for them? A. Sure.

Q. Relative to when newsboys deliver the Daily News, and if they are injured, are they covered by insurance, and if they are—

The Court: Which question do you want answered? You have already asked three questions up to now and you are starting another one. Which one are you going to ask him?

Q. (By Mr. Hochman): Are the boys covered by insurance?

A. Are you talking about the carrier boys?

Q. Yes.

A. As to the workman's compensation or other insurance?

Q. Yes, sir.

A. I am not sure about workman's compensation. There is some kind of a carrier policy that the premium, at least half of it if not all of it, is paid by the district men or dealers, and whether or not they charge the carrier boy, I [43] do not know.

Q. Does the Daily News or the Stockholders Publishing Company pay any of the amount?

(Testimony of Arthur G. Pollock.)

A. Well, that is what I said in the first place. I don't think they do.

Q. How about within the 10-mile zone?

The Court: Go ahead and finish your answer.

The Witness: Well, if they do I believe it is approximately half. But I don't think they do. I wouldn't like to be sure on that. I don't even know whether that was in effect in '44 and '45.

Q. (By Mr. Hochman): Mr. Pollock, suppose X was a district route man and he wished to increase the amount of money he was making could he go into a new section of town and begin a campaign for subscribers by himself?

A. No, he has to stay in the territory in which he is assigned to him. If there was no business in that territory, but if it came under his general territory, he could. But he couldn't as an individual just go anywhere he so desired.

Q. I didn't have reference to anywhere that he so desired, I had reference to a territory where no one else was.

A. Well, the city is divided up so that all the territory is covered. Now I suppose he could go in there and solicit and get paid for new orders that his carriers make [44] through carrier prizes, or what have you, but he could not get the earnings from serving the subscribers outside of his own territory.

Q. Is it true that an area of a given man can be reduced by the company, Stockholders Publishing Company, whether or not the man wants it reduced?

(Testimony of Arthur G. Pollock.)

A. That can be done, yes.

Q. That can be done?

A. That can be done, either reduced or increased.

Q. By action of the paper, is that correct?

A. Well, it is done by mutual agreement.

Q. That was not my question, sir.

Mr. Binford: He answered it by saying it was done by mutual agreement and not by the paper.

Mr. Hochman: Now, counsel, let me conduct the examination of the witness.

Q. I am not trying to trap you, Mr. Pollock, just want to know the legal power of the plaintiff. Can the plaintiff by itself without mutual consultation with a given route district man or route district dealer increase or decrease his district?

Mr. Binford: That calls for a conclusion of the witness, and I object to it.

The Court: Objection sustained. [45]

Q. (By Mr. Hochman): Did the company ever reduce a man's district without his consent?

A. Not without consultation.

Q. Does the Daily News have a general office which the district men use in the company for paper work or whatever else they wish to carry on there?

The Court: You mean at their office?

Mr. Hochman: At their office.

The Witness: Not at this time.

Q. (By Mr. Hochman): Did they in 1943?

A. I believe they did.

Q. And '44 and '45?

A. That is the route district men.

(Testimony of Arthur G. Pollock.)

The Court: They had quarters?

The Witness: Yes.

The Court: Which they used?

The Witness: They had their desk space there and their files, whatever records was necessary.

Q. (By Mr. Hochman): Did they pay rent for this place? A. No.

Q. Mr. Pollock, relative to understanding the complete operation here, the newspaper sells the paper to the district [46] men who in turn sell it to the carriers, is that correct?

A. That is correct.

Q. Is it your testimony that the newspaper has nothing to do with the price that the district man charges the newspaper carrier?

A. Well, I believe I testified that there was a suggested price in there. The prices or the rates to the carrier boys are not all alike. There are many, or at least several, different rates.

Q. Isn't it true that in the past you have had complaints from parents of carrier boys relative to their boys, that is, relative to the parents' children's earnings, and thereafter the company adopted a more stringent control?

Mr. Binford: Just a moment. I object to that unless he nails it down to 1943, '44 and '45. If you will amend it to those years, I have no objection.

Mr. Hochman: So amended.

The Witness: I couldn't testify to those three years as apart from the others, but there have been complaints and that is one of the reasons why this

(Testimony of Arthur G. Pollock.)

suggested area of rates be, shall I say, put in effect or considered.

Q. (By Mr. Hochman): Can the Daily News fire a district man if it wishes to?

Mr. Binford: Just a moment. That is objected as [47] calling for a conclusion of the witness.

The Court: Sustained.

Mr. Hochman: The answer is in Plaintiff's Exhibit 1.

The Court: What is that?

Mr. Hochman: The answer to my own question is in Plaintiff's Exhibit 1.

The Court: There is no question pending. That argument or are you just talking to yourself?

Q. (By Mr. Hochman): Do the district men receive a minimum wage?

Mr. Binford: I object to the use of the word "wage." If he asked if they received a minimum amount, I would have no objection.

The Court: Objection sustained. That is one of the issues of law here and of fact. It calls for a conclusion of the witness.

Mr. Hochman: The whole question, your Honor?

The Court: Yes, did they receive a minimum wage.

Mr. Hochman: A minimum amount?

The Court: That is different.

The Witness: The route men do have a minimum guarantee.

Q. (By Mr. Hochman): Do the district route men?
A. That is right, city route men.

(Testimony of Arthur G. Pollock.)

Q. And your suburban route men? [48]

A. No.

Q. Do they receive vacations, the district men?

A. Yes.

Q. With pay? A. Yes.

Q. Has the Daily News, the Stockholders Publishing Company, been sued by anyone who was injured by a newsboy while delivering newspapers?

Mr. Binford: Objected to as incompetent, irrelevant and immaterial, not tending to prove or disprove anything before this court at this time.

The Court: Objection sustained.

Mr. Hochman: May I make an offer?

The Court: It would not make any difference if you proved that they were sued. Anybody can sue anybody and it does not mean a thing.

Mr. Hochman: It is a preliminary question. I ask the court's indulgence on a preliminary question. Then I would like to know in terms of an offer of proof what happened.

The Court: What is your offer of proof?

Mr. Hochman: I don't know what the witness is going to answer, but I am interested in knowing whether or not the Daily News has acknowledged liability.

The Court: What do you offer to prove?

Mr. Hochman: That by acknowledging liability there is [49] a line.

The Court: No, what facts do you offer to prove?

(Testimony of Arthur G. Pollock.)

Mr. Hochman: Your Honor, I don't know what the witness will answer, but I do know that the line of questioning, if either yes or no, will reveal facts.

The Court: The objection is sustained unless you have some proof which you can or are prepared to offer to show. Otherwise it is absolutely immaterial.

Mr. Hochman: I fail to see how the question is immaterial. I think that liability by the plaintiff would show——

The Court: The objection is sustained.

Q. (By Mr. Hochman): Mr. Pollock, can the district men work for other newspaper publishing companies? A. And do the same work?

Q. Yes.

A. No, not in a competitive field.

Q. Do they have a minimum number of hours which they must work?

A. I believe they are excluded from hours under the contract. Whatever provision is in the contract would govern.

Q. Which contract, sir?

A. This Exhibits A, B and C, the contract between the Guild and the paper.

I would like to say, if I may—maybe we can clear [50] something up here—that for the purpose of the bargaining rights these men, city route men and dealers, are termed employees for bargaining purposes only under that contract.

Mr. Hochman: Your Honor, I move to strike that answer as not responsive.

(Testimony of Arthur G. Pollock.)

The Court: It may be stricken.

Do any of your dealers and route men also deal in the distribution of non-competitive newspapers or magazines?

The Witness: Not to my knowledge.

The Court: Do any of your dealers, for instance out of town, sell other newspapers?

The Witness: In some of the smaller areas or communities I believe they do. One dealer will handle more than one paper.

The Court: Do you know whether or not any of them solicit subscriptions to magazines, say of Collier's, the Cosmopolitan, Post, Police Gazette?

The Witness: No, I do not know whether they do or don't.

Q. (By Mr. Hochman): When a district man is unhappy with the situation, does he——

The Court: Counsel, you might just as well stop here. How does this witness know whether somebody is unhappy? Counsel is bound to object to it.

Mr. Hochman: I am assuming that fact, when he is unhappy, [51] and not if he is unhappy.

The Court: How does he know when he is unhappy?

Mr. Hochman: I haven't finished the question.

The Court: I think perhaps you had better start over again.

Mr. Hochman: With or without the "When"?

Q. Assuming, Mr. Pollock, that district man has a grievance, does he operate through the Guild or

(Testimony of Arthur G. Pollock.)

does he deal directly with someone in the new paper?

A. Well, assuming he has one he can do it either way.

Q. Who is over these route men and district men?

A. Supervisors.

Q. What are their duties?

A. Well, the supervisory capacity is to see that the results are obtained.

Q. Will you elucidate for us, please?

A. I couldn't say everything they do. The supervisors are the men that the city route men and dealers check with, transact business with, and they are in turn under a circulation director who is the man over all the circulation. If they need anything or have anything to transact in any way they go to the supervisor or call him or come in.

Q. And these suggestions are made by the supervisors, promotional suggestions and things of that nature?

A. That is so, possibly from them or from the circulation [52] director.

Mr. Hochman: I have no further questions, your Honor.

The Court: Redirect?

Mr. Binford: I have no redirect.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Binford: Call Mr. Fahs.

F. B. FAHS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please?

The Witness: F. B. Fahs; F-a-h-s.

The Clerk: And your address?

The Witness: 12142 Bradfield Avenue, Lynwood.

Direct Examination

By Mr. Binford:

Q. Mr. Fahs, what is your business or occupation?

A. I am a dealer for the Los Angeles Daily News.

Q. And what area do you cover, roughly what geographical area?

A. I have the city of Lynwood, a portion of South Gate and a portion of Compton.

Q. When did you first become a dealer for the Daily News? [53]

A. December, 1938.

Q. Now will you tell the Court how you operate your district and how you get your papers and how you get them distributed?

A. Well, I buy my papers from the Daily News. I am billed for the papers once a month. The bill is due on the 10th of the month. The papers in my case are delivered to me by truck at a corner in the city of Lynwood, and that is at the moment. In prior years they were distributed wherever the spots happen to be by mutual agreement with me and the

(Testimony of F. B. Fahs.)

Daily News. The truck spots them at one or perhaps more specific places where I then pick them up and further distribute them to corners or to carrier boys' homes.

Q. Do you do that in a car?

A. I do that in my own car.

Q. Does the Daily News pay for the car or the upkeep on the car? A. No, sir.

Q. Now you distribute these newspapers to the carrier boys. What kind of a deal do you have with the carrier boys?

A. I charge the boys a rate per hundred copies to each of the boys. That rate may vary depending on the difficulty of the route. But that rate is arrived at, or rather when I engage a carrier, why have a discussion with the boy and his parents and it is arrived at that he will pay so much for [54] his papers per hundred copies, and I usually go further and say that if he has a daily average of 100 papers he will make approximately so much money, because the difference between the whole sale rate that he pays me for the papers and the \$1.60 retail price that he collects from the subscribers the difference between that will approximate so many cents per customer and 100 customers times that number of cents will give his earnings.

The Court: What is the \$1.60?

The Witness: That is the retail price per month for the Daily News home delivery.

Q. (By Mr. Binford): Now the carrier boy deliver to the subscribers and they collect from the

(Testimony of F. B. Fahs.)

subscribers, is that correct? A. Yes, sir.

Q. Supposing that they had somebody walk out on them and didn't pay their bill for the \$1.60 a month, who loses that \$1.60?

A. Theoretically the carrier boy loses it. I bill him for so many papers and he is billed for those papers and he pays for those papers.

As a matter of practical practice, I and many district men—I will speak for myself—will bonus, discount or give the boy a rebate for that move-out.

Q. In other words, so that you will absorb at least [55] possibly some of such loss yourself?

A. That is correct.

Q. Does the Daily News reimburse you for that loss? A. No, sir.

Q. Now do you have a helper, or have you ever had a helper on your route? A. Yes, sir.

Q. Did you hire him yourself?

A. Yes, sir.

Q. Did you pick him out yourself?

A. Yes, sir.

Q. Did you pay him a salary or wage?

A. I paid him a salary.

Q. And do you deduct social security for him?

A. I do.

Q. And does the Daily News reimburse you for the money you pay out for this salary?

A. No, sir.

The Court: Does the quantity of papers vary from day to day?

The Witness: It is at my discretion, sir.

(Testimony of F. B. Fahs.)

The Court: What do you do, phone in your order every day?

The Witness: Well, I get the same order unless I give them a different order. I order the number of papers I want. [56] If I want the same number tomorrow and the next day I won't call in and I will get the same number.

Q. (By Mr. Binford): Do you maintain your office in your home or do you have a separate establishment? A. In my home.

The Court: Do you solicit new subscribers?

The Witness: I do, sir.

The Court: And the newsboys do, too?

The Witness: We do, yes.

The Court: When a customer to whom a paper is delivered and when he pays, say he pays by check, does he make the check out to the boy or to you?

The Witness: I instruct my carriers in discussion before their first collection period on many points. The boys are dealing with quantities of money for the first time. In so far as checks are concerned, I tell them to have those checks made out to the Daily News. I tell them not to make their checks out to themselves or to cash or to Mr. Fahs but to the Daily News.

I have arrangements with my bank—the boys when they pay their bills turn those checks in with the rest of their cash to me, all of which as far as they are concerned is cash—and I have arrangements with my bank to merely sign the Daily News

(Testimony of F. B. Fahs.)

and then I sign my name under it. If the check [57] bounces it comes back to me.

I tell the boys they should make them out to the Daily News because I don't want them bothering customers with checks or holding up checks that carriers might very well do.

I will take my chances, and if a check bounces I will follow it up whereas a boy would have difficulty in many respects.

The Court: Do you bill your customers or leave it up to the boy to do that?

The Witness: My wife writes the receipts. We hand the receipts to the carriers on the 25th of the month. They are made out with the name, the address, the amount that is due, and all the boy has to do is to see them and collect.

We have a green collection notice that we insert in the paper the day before the boy is to collect so the people are aware that he will be there. We do not bill them by mail or other than by a green collection notice.

The Court: And he takes the receipt back around and if they pay him the money he gives them a receipt?

The Witness: That is correct.

The Court: Which is already signed by you or your wife?

The Witness: No, he signs his own receipt. We merely, in order to have things correct, write the receipts and date them and the correct amount is on there.

(Testimony of F. B. Fahs.)

The Court: So if somebody pays him cash he just signs [58] his own name?

The Witness: That is correct. He is the collector. He is collecting for himself. Actually we are doing part of his work.

The Court: I understand.

Q. (By Mr. Binford): The "we" is you and your wife in that instance? A. That is right.

Q. Does the Daily News pay your wife anything?

A. I wish she were here.

The Court: The answer is no?

The Witness: The answer is no.

Q. (By Mr. Binford): Do you pay a self-employment tax to the United States Government?

Mr. Hochman: I object, your Honor. It is immaterial as to whether it is done or not.

The Court: Overruled.

The Witness: In the last three or four years I have.

Mr. Hochman: Your Honor, in 1943, '44 and '45 there was no self-employment tax.

Mr. Binford: Also the testimony has been that the operation is substantially the same today as it was in that time.

The Court: Yes.

Mr. Hochman: On cross-examination I was limited to '43, [59] '44 and '45. even though the operation was substantially the same. I feel the counsel should also be limited as I was limited.

The Court: No, I think there was one question

(Testimony of F. B. Fahs.)

there that I sustained an objection to because yours was a shotgun question. The objection is overruled.

Q. (By Mr. Binford): I show you here a form furnished by the United States Government for 1953 and ask you if that is the type of form that you filled out accompanying your 1953 income tax?

A. Assuming I paid it?

Q. Assuming you paid it.

A. Yes, I used that.

Mr. Binford: I offer this profit or loss from business or profession Schedule C under Form 1040 for 1953 as Plaintiff's exhibit next in order.

Mr. Hochman: Your Honor, I object on the grounds heretofore mentioned.

The Court: Overruled. It is admitted.

The Clerk: Plaintiff's Exhibit No. 4.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No 4.)

Q. (By Mr. Binford): Does the Daily News deduct from or bill you, inasmuch as they pay you no money, does the Daily News pay you or [60] bill you for social security? A. No, sir.

Q. Does the Daily News bill you for withholding or income tax? A. No, sir.

Q. Or State unemployment tax?

A. No, sir.

Mr. Hochman: Your Honor, I object to this in terms of a continuing objection to this line of questioning, as to its materiality.

The Court: Overruled.

(Testimony of F. B. Fahs.)

Q. (By Mr. Binford): If you draw too many papers on a given day——

The Court: “Too many” meaning more than he can sell?

Q. (By Mr. Binford): ——more than you can sell, and you have, say, ten papers left over on a day does the Daily News give you credit if you return those papers? A. No, sir.

Q. They are a loss to you for whatever you pay for them?

A. Assuming I have ordered so many, X number of papers, I pay for them whether I sell them or not. If they send me extra copies by error I can return them.

Q. But if they fill your order and you have ordered [61] too many it is your loss?

A. Correct.

Mr. Binford: You may examine, counsel.

Cross-Examination

By Mr. Hochman:

Q. Mr. Fahs, does the Daily News know how much your boys, your carriers, pay for the papers?

The Court: Does he know what?

Q. (By Mr. Hochman): What your carriers pay for papers.

A. May I qualify my answer on that?

Q. Certainly.

A. Perhaps a year ago I was asked to make out a list of, if I recall this correctly, a list of what

(Testimony of F. B. Fahs.)

each boy made, what he was charged for his papers, the difference as routes differed in rates. But I believe that was the first time I ever submitted such a list to the Daily News. They had never asked me or told me other than by suggestion that a boy should earn approximately so much. They had never asked me to submit a list of my rates, no.

Q. How long have you been working for the company, sir?

The Court: Working for what company? I thought that is what I was going to have to decide, whether or not he ever worked for them. [62]

Q. (By Mr. Hochman): How long have you had an association with them?

A. I have been a dealer for the Daily News since 1938.

Q. Mr. Fahs, can you be fired for any reason?

Mr. Binford: I object to that as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. (By Mr. Hochman): Is there anyone over you who is associated with the Stockholders Publishing Company?

A. I have supervisors, and there is a circulation manager.

Q. What type of supervision occurred. Relate it as well as you can to 1943, '44 and '45.

The Court: Do you understand the question?

The Witness: Yes, sir. I hesitate because, as far as I am concerned, the supervision is the same now as it was when I went to work for them. But as far

(Testimony of F. B. Fahs.)

as '43, '44 and '45 is concerned, I was in the Army in those years.

Mr. Hochman: I move to strike all of this evidence, your Honor. This is an incompetent witness.

Mr. Binford: He testified a number of times that his operation was the same prior to 1943 and up to the present time. He said it has been always about the same operation. Mr. Pollock also said the same thing, that the operation has [63] always been substantially the same.

The Court: I think the only issue here is whether it was '43, '44 and '45.

Did your wife run the business while you were gone?

The Witness: No, sir, I was in the Army and left in December of '42.

The Court: And returned when?

The Witness: In February of '46.

The Court: I do not think his testimony is material.

Mr. Binford: Other than the statement that the witness made that his operation was the same prior to the time when he went away than it is at the present time. I recognize the position that he was here during the three years while he was in the Army. His operation was the same when he left and the same when he came back. It is a reasonable assumption that the Daily News' operation continued the same in the interim, with the testimony of Mr. Pollock who has testified that it has always been the same.

(Testimony of F. B. Fahs.)

The Court: His testimony coupled with that of Mr. Pollock that it has always been the same as to what has occurred since may be admissible for such inferences as may be drawn, but certainly it is not direct testimony as to '43, '44 and '45. So it will go to the weight of his testimony and not to its admissibility, so your motion to strike is denied. [64]

Have you finished your cross-examination?

Mr. Hochman: No, your Honor. There is a question pending.

The Court: Is there?

Mr. Hochman: Yes, your Honor.

The Court: He said he did not know, that he was in the Army in '43, '44 and '45. That was his answer to your question.

Mr. Hochman: Your Honor, I asked the question before relative to whether or not there were complaints received. The answer given me was assuming business was going on as it has been all along to Mr. Pollock relative to complaints by newspaper carriers' parents, I was told I couldn't pinpoint it, that it wasn't admissible.

The Court: What is the unanswered question here?

Mr. Hochman: I asked what type of supervision occurred.

The Witness: I answered you.

The Court: In '43, '44 and '45, and he said he was not there in '43, '44 and '45. Now you want your question answered as to what type of supervision since, and before?

(Testimony of F. B. Fahs.)

Gate, Lynwood, North Long Beach—[67] everything south of the Firestone plant. Dad worked 15 years and then Dad died all of a sudden. Nobody else wanted it, so I went to the Daily News and told them I would like to have it, and nobody wanted it after a week and they said, "Fahs, you can take it." So I have been with them ever since. That is how I got it.

The boundary was there. I took over my dad's rate for the papers. The files were at his home. That was prior to my affiliation with the Newspaper Guild. It isn't handled that way now, but that is the way I got it. Nobody else wanted it.

Mr. Hochman: No further questions.

The Court: Step down.

(Witness excused.)

The Court: We will have the afternoon recess.

(Short recess.)

Mr. Hochman: Your Honor, at this time I would like to renew a motion to strike the testimony of Mr. Fahs on the grounds that he wasn't present in the years in question.

The Court: The motion is denied.

Next witness.

Mr. Binford: I will call Mr. C. D. Melton.

C. D. MELTON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [68]

The Clerk: State your name in full?

The Witness: C. D. Melton.

The Clerk: M-e-l-t-o-n?

The Witness: Right.

The Clerk: Your address?

The Witness: 615 Eaton Drive, Pasadena 8.

Direct Examination

By Mr. Binford:

Q. Mr. Melton, what is your business or occupation?

A. I am a wholesale distributor of newspapers for the Daily News.

Q. What area, general geographic area, do you operate in?

A. East Los Angeles, part of Montebello, part of Monterey Park.

Q. Will you tell us how you conduct your operation, where do you get your papers, what do you do with them when you get them, and so forth?

A. Well, my papers are spotted by truck and I pick them up in the morning and take them to the homes of the carriers who distribute them to the subscribers.

Q. Are you billed for those papers by the Daily News?

A. Yes, sir.

Q. You have a deposit up with the Daily News

(Testimony of C. D. Melton.)

of some sort? [69] A. Yes, sir.

Q. And you sell them to the carrier boys?

A. Yes, sir.

Q. Now the carrier boys deliver them to the ultimate consumer or subscriber. Do they send out the billings themselves, the carrier boys?

A. No. I make the bills out and furnish them to the boys and they make the collections and pay their bill.

The Court: To whom is the bill sold to subscribers indebted, to you?

The Witness: No, the carrier is in business for himself. I only make out a bill with the address and the name and the date that the subscriber owes for and the amount, and turn it back over to the carrier.

The Court: What is it, a receipt book?

The Witness: A receipt book.

The Court: So he just signs the receipt?

The Witness: He either signs it if the people insist, some of them sign it, and once it is torn out, it is in a duplicate form, the boy keeps a yellow slip in his book which says "This is not a receipt," and he gives the original to the customer.

Q. (By Mr. Binford): If there is a move-out, who stands the loss?

A. Well, the boy understands when he takes the territory [70] that he stands all losses, but I absorb some of it through bonuses. I always mail a bill to the people. All losses, practically all, are move-outs, and if I can't find out from the neighbors where they moved to or collect it for him, or have

(Testimony of C. D. Melton.)

another district man who is in that part of town, then I mail the bill and give the boy credit at least for the amount of the papers, the cost of those papers.

Q. So he won't take quite as much of a loss?

A. Yes, sir.

The Court: Then if you ultimately collect the bill he gets the credit?

The Witness: He gets the rest of it.

Q. (By Mr. Binford): Now if you order more papers than you need on a given date, does the Daily News give you credit for returned papers?

A. No, sir. If I want to change up or down I call it in every day and if I don't then there is extra papers and I pay for whatever comes out on the truck every morning.

Q. Do you hire a helper or have you hired a helper from time to time?

A. I have at different times, yes, sir.

Q. Incidentally, when did you first become a route district man for the Daily News?

A. I started with the old Record in January, 1933. [71]

Q. And you came with the Daily News when the Daily News took over the Record, is that correct?

A. Yes, sir.

Q. Do you remember what year that was?

A. Around in the spring I believe of '34 or '35.

Q. '34 or '35? A. Yes.

Q. Do you have an office or did you have an office?

(Testimony of C. D. Melton.)

The Court: You have been with them continuously?

The Witness: Yes, sir.

Q. (By Mr. Binford): During 1943, '44 and '45?

A. That is right.

The Court: Your practice has always been the same as you have described here?

The Witness: I don't think there has been any difference whatsoever in the 21 years I have been there in the operation, at least during '43, '44 and '45 and up to today it has been practically identical.

Q. (By Mr. Binford): You say you have hired helpers in the past. Did you pay their salaries or wages?

A. Salary or commission, whatever it happened to be.

Q. Did the Daily News reimburse you for whatever you paid them? [72]

A. No, sir, never.

Q. Do you maintain an office in your home or do you have a separate office?

A. Well, I have both. I have always had an office in my home.

The Court: Then you have a separate office, too?

The Witness: Yes, sir.

Q. (By Mr. Binford): Does the Daily News pay any rent to you for your separate office?

A. No, sir.

Q. Does the Daily News pay the rent to you for your office in your home?

A. No, sir.

Q. When you get your bill at the end of the month from the Daily News, are you also billed for

Testimony of C. D. Melton.)

cial security? A. No, sir.

Q. Are you billed for State Unemployment Insurance? A. No, sir.

Mr. Hochman: I object to these questions.

The Court: Overruled.

Mr. Hochman: May I have a continuing objection?

The Court: It may extend to all this line of questioning.

Mr. Hochman: Thank you. [73]

Q. (By Mr. Binford): Are you billed for federal income tax? A. No, sir.

The Court: You mean by the Daily News?

Mr. Binford: By the Daily News.

The Witness: No, sir.

Q. (By Mr. Binford): Now, for the past several years have you paid a self-employment social security tax?

A. The last three years, I believe, three or four. I just can't remember. Since it became law.

Mr. Binford: May I have Plaintiff's Exhibit 4?

(The exhibit referred to was passed to counsel.)

Q. (By Mr. Binford): I show you Plaintiff's Exhibit 4—

Mr. Hochman: Your Honor, may the continuing objection be to this also?

The Court: It will go to the whole line of questioning and it may be deemed to be so made on the ground it is immaterial, and it is overruled.

(Testimony of C. D. Melton.)

Mr. Hochman: Thank you.

The Court: Is that the form you used?

The Witness (Examining exhibit): Yes, sir, this is the form.

The Court: Anything else? [74]

Mr. Binford: I have no further questions, your Honor.

The Court: Cross-examine.

Cross-Examination

By Mr. Hochman:

Q. Mr. Melton, you mentioned that the newspaper boy, the carrier, was "in business for himself," is that correct? A. Yes, sir.

Q. Are you in business the same way, sir?

A. On a commission basis, yes sir.

Mr. Hochman: I have no further questions.

The Court: What do you mean, a commission basis?

The Witness: The amount of money I make is the difference between the rate that the Daily News bills me for the papers and the amount that I bill and collect from the carrier boys.

The Court: Does the Daily News determine what you shall bill and collect from the carrier boys?

The Witness: They never have since I have been there ever said, "You make the rate so-and-so."

The Court: Do you fix those rates by negotiation with the boys?

The Witness: By negotiation with the boys.

Testimony of C. D. Melton.)

The Court: Are they all the same or is there some difference?

The Witness: No, sir, they vary in different parts of [75] town, and even in the district I have shown, due to the amount of saturation in a certain neighborhood, a boy who delivers a hundred naturally in the same space another boy would deliver 40 or 50.

The Court: You have a lot of hilly country in your neighborhood?

The Witness: Yes, sir.

The Court: The rate is different there than here it is level?

The Witness: Yes, sir.

The Court: Do any of your boys have to have cars?

The Witness: No, sir, I don't have any.

The Court: Very well.

Any redirect?

Redirect Examination

By Mr. Binford:

Q. Do you use a car in your business?

A. Yes, sir.

Q. To distribute the newspapers to your carrier boys? A. Yes, sir.

Q. Does the Daily News pay for any of the expense of that car? A. No, sir.

Mr. Binford: I have no further questions.

The Court: Step down. [76]

(Witness excused.)

The Court: Are the rest of your witnesses all cumulative?

Mr. Binford: They are all cumulative, your Honor, and I have a number of them. It will be virtually the same testimony from each witness in different language.

The Court: Do you have the names of them?

Mr. Binford: Yes, I do.

The Court: Would you be agreeable to stipulating if these parties are identified?

Mr. Hochman: Your Honor, I had planned on calling two witnesses, one of which happens to be in the courtroom under subpoena.

The Court: No, I mean about the rest of his witnesses. What I am trying to get at now is this stipulation about his additional witnesses, if they are all just cumulative.

Mr. Hochman: I would like one more and then I can save the Government subpoena money. In other words, we have subpoenaed the same man.

Mr. Binford: You can call your man.

The Court: What I am trying to get over is this, in five minutes he can rest his case, can you not?

Mr. Binford: I can, your Honor.

The Court: Then the witnesses are still here and you can call them yourself. [77]

Offer your stipulation and let us see, that is so-and-so were called and testified his answers to the same questions would be substantially the same as that given by the two previous witnesses.

Mr. Binford: I will offer this stipulation: If red Hummel, Harry Waters and Glenn Murray were called their testimony would be substantially the same as the testimony of the two previous witnesses.

The Court: The difference being in their routes and their carriers?

Mr. Binford: That is correct.

The Court: Do you accept the stipulation?

Mr. Hochman: I will accept the stipulation.

The Court: Very well. Does the plaintiff rest?

Mr. Binford: The plaintiff rests, your Honor.

Mr. Hochman: Your Honor, the Government offers Defendants' Exhibits A, B and C for identification purposes in evidence.

The Court: Admitted.

(The documents referred to were received in evidence and marked Defendants' Exhibits A, B and C.)

Mr. Hochman: Call Mr. Mahdesian, please. [78]

SAMUEL G. MAHDESIAN

Called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please?

The Witness: Samuel G. Mahdesian; M-a-h-d-e-s-i-a-n.

The Clerk: And your address?

The Witness: 516 South Alexandria, Los Angeles 5.

(Testimony of Samuel G. Mahdesian.)

Mr. Hochman: May it please the court, before we continue with this witness, lest the stipulation preclude something, let me state that I should wish the court to within the framework of that stipulation reflect that the continuing objection made heretofore relative to the two previous witnesses who did testify be continued over covering the three in the stipulation.

The Court: Yes. The intention was that if they were called the same questions would be asked and their answers would be substantially the same and that it would be subject to all the objections and rulings which the court made on the two previous witnesses.

Mr. Hochman: Thank you.

Mr. Binford: So stipulated.

Direct Examination

By Mr. Hochman:

Q. Mr. Mahdesian, what is your occupation, sir?

A. I am district route manager of the Daily News. [79]

Q. How long have you been so employed, sir?

A. Since May 20, 1924.

The Court: You are a district route manager, is that right?

The Witness: Well, yes, that is the term I use.

The Court: Is there some difference between a district route manager and a district route man, or route district man?

Testimony of Samuel G. Mahdesian.)

The Witness: It is the same thing, taking care of a certain area.

The Court: You have an area?

The Witness: That is right.

The Court: In other words, you are not employed at the Daily News Office?

The Witness: No.

The Court: As manager of all of their district route men?

The Witness: No.

The Court: You are a manager of a district route?

The Witness: That is right.

Q. (By Mr. Hochman): Were you so employed 1943, '44 and '45? A. I was.

Q. Confining your testimony as near as you can to those years, Mr. Mahdesian, did you at that time have a desk [80] or desk space in the Daily News Building? A. I did.

Q. Did you pay rent for that space, sir?

A. I did not.

The Court: What is your territory?

The Witness: At that time in '42 I had the southeast section of Los Angeles from Pico to Manchester, Main to Alameda.

In 1944 and '45 I had the area known as Leimert Park, Baldwin Hills and View Park.

At the present my area that I have is known as Torro Vista, to be exact the boundaries are from Pico to Florence and from Overland to Walgrove.

Q. (By Mr. Hochman): Mr. Mahdesian, to

(Testimony of Samuel G. Mahdesian.)

your knowledge was there any complaints by parents of carrier boys relative to the amount of money their sons were receiving for performing these tasks?

A. Not in my particular case, but I have heard of men who have had difficulties.

Mr. Binford: Move to strike the latter part as it is not within the knowledge of the witness.

The Court: It may be stricken.

Q. (By Mr. Hochman): Mr. Mahdesian, does the Daily News know how much you are charging your boys for papers? [81]

A. Yes.

The Court: What is your question, at the present time?

Mr. Hochman: At that time.

The Court: In '43, '44 and '45?

Mr. Hochman: Yes. I have asked the witness to confine his testimony to those dates.

The Court: Very well.

Q. (By Mr. Hochman): Under what type of operation were you associated with the paper? To clarify the question, Mr. Mahdesian, if difficulties arose was there any supervision of you? In your own words, could you describe your association?

Mr. Binford: Just a moment. I will object to that as vague and inconclusive. I wouldn't know how to answer such a question. If counsel will specify what he wants, I am sure the witness can answer it. Objected to as being vague and indefinite.

The Court: I think it ought to be more specific.

What you are getting at, do you make the decisions in connection with your business?

(Testimony of Samuel G. Mahdesian.)

The Witness: I do make the decisions but I have found in my experience of letters being benefited by the counsel and advice of those that are associated with the paper.

The Court: Do the supervisors of route men at the paper, direct you in any decision that you shall make, direct you [82] to make a specific decision or do they suggest it?

The Witness: They have not—if I may answer—they have not imposed, but I have often solicited their suggestions and counsel.

The Court: What I am getting at is, do they call you up and say, do so-and-so?

The Witness: No, they have not done that, but they have called me and imparted information that Mr. Jones called and said that the window was broken and wants to see you at once, or they have missed their paper, to that extent impart information as to what has happened.

Q. (By Mr. Hochman): Have you attended meetings where different route men would get together with, say, the circulation manager or the supervisors? A. Yes.

Q. At any of those meetings were suggestions made?

Mr. Binford: Just a moment. I will object to that as no proper foundation laid. If we can get the time, place and who was present I will withdraw my objection.

Mr. Hochman: Your Honor, I have asked the

(Testimony of Samuel G. Mahdesian.)

witness to confine the testimony to the best of his ability to '43, '44 and '45.

The Court: Very well.

Mr. Hochman: We are not trying to impeach this man, we [83] are trying to get information.

The Court: You want it for those years and your question is whether or not he attended meetings attended by route men and supervisors where any suggestions were made?

Mr. Hochman: Suggestions, yes. That word has been bandied about and I want to know if it has a definite meaning.

The Witness: I have been at meetings but I cannot say that they were in those years, but probably they could be in those three years, yes.

The Court: What were they, promotional suggestions?

The Witness: Yes, pep talks and, for instance, a new feature was coming to the paper and they would call and tell us beforehand to be on our toes, that Drew Pearson is going to be a columnist, that Eleanor Rossevelt is going to write a column, and we are going to put out circulars and when those subscriptions come in do your best not to antagonize them and give them good service when they subscribe—in that trend.

Q. (By Mr. Hochman): Now you mentioned, Mr. Mahdesian, that in 1943 you had one district and in 1944 you had another, is that correct?

A. Yes.

Q. How did that change occur?

(Testimony of Samuel G. Mahdesian.)

A. Well, for about seven years—from 1924 to 1942 I [84] had the southeast, which had a nickname of “Modern Africa,” and I was kind of fed up with it, and I went and told the office that I am having quite a bit of trouble—when I say “trouble.” The collections were hard, and so forth—and I had been there quite a long time, and if I got a better district I would stay, otherwise I would look around for another job. And I was given a district that opened on the west side.

The Court: That was the Leimert district?

The Witness: Yes.

The Court: And then how did you shift to the other one? You saw a new subdivision coming up?

The Witness: When the paper changed from the afternoon to the morning, and as the Guild had already entered into the picture, the picture was changed and whenever areas were opened up then our seniority came into effect where we could have—

The Court: The choice?

The Witness: —the choice of choosing, and I chose Morro Vista.

The Court: I see.

Q. (By Mr. Hochman): Can you enlarge your district by yourself, sir?

A. The boundaries or the circulation?

Q. The boundaries. A. No. [85]

The Court: You signed a contract with them?

The Witness: That is right.

The Court: By the way, I wonder if I might inquire of Mr. Fahs and Mr. Melton and the other

(Testimony of Samuel G. Mahdesian.)

man if they signed the same contract as Exhibit 1?

Mr. Binford: Mr. Melton and Mr. Fahs are here.

And you each signed the contract?

Mr. Melton: Yes.

Mr. Fahs: The dealer agreement?

Mr. Binford: The dealer agreement.

Mr. Fahs: Yes.

The Court: Both of them?

Mr. Binford: Both of them.

The Court: Is that included in your offer?

Mr. Binford: That is included in my offer.

The Court: Do you accept that, Mr. Hochman?

Mr. Hochman: Yes, certainly.

The Court: Very well.

Q. (By Mr. Hochman): Mr. Mahdesian, have you ever been interrogated relative to what you do?

The Court: By whom, where, when? By the McCarthy Committee or by whom? You ask if he has ever been interrogated.

Mr. Hochman: Your Honor, so far the witness has had no trouble with my questions. [86]

The Court: That does not make any difference, I am supposed to be the one who has to decide the matter. If the question and the answer does not make any sense to me, why ask them?

Mr. Hochman: I appreciate that.

Q. Relative to 1943, '44 and '45.

The Court: By whom?

Mr. Hochman: In those years.

The Court: By whom? What difference does it

Testimony of Samuel G. Mahdesian.)

ake? Suppose his wife asked him what he does or
e meets someone and she interrogates him?

Mr. Hochman: Your Honor, we have the contracts
ere in which case the written documents speak for
emselves. We pursue oral testimony in some way
cover any ambiguity which may be present. To
nderstand what these men are we have to know
hat they think of themselves.

The Court: I appreciate your philosophical dis-
rtation on the purpose of a lawsuit, counsel—

Mr. Hochman: Not on the purpose of the law-
it, but the purpose of the question of what this
an considers himself.

The Court: The question is wholly unintelligible
nd it is immaterial whether he has been interro-
ted unless you relate it to something about some
ficial money or something and the time and the
ace. [87]

Q. (By Mr. Hochman): Mr. Mahdesian, have
ou ever described what you do to a friend who has
quired of you in 1943, '44 or '45?

Mr. Binford: I will object to that as incompe-
nt, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Hochman: I will make an offer of proof,
our Honor. May I make my offer?

The Court: From what you have said it sounds
ke you are laying ground for impeachment.

Mr. Hochman: Not of this witness, your Honor.

The Court: And the way to lay the ground for im-
eachment—and besides, a friend, that is too indefi-
te and uncertain.

(Testimony of Samuel G. Mahdesian.)

The objection is sustained.

Mr. Hochman: May I make my offer?

The Court: Your offer of proof is immaterial. This has absolutely no date, person, time or anything else involved. If you can relate it to some specific person and a specific date, then it will mean something in the lawsuit. But whether or not he ever described what he did to a friend in 1943, '44 or '45 is wholly immaterial. Maybe he was kidding his friend, I do not know.

Mr. Hochman: You determine that on cross-examination.

The Court: What are you trying to prove? [88]

Mr. Hochman: I can't testify, your Honor.

The Court: I am asking you, what are you trying to prove?

Mr. Hochman: I will say that he considered that he was working for the Daily News.

The Court: Are you trying to prove that on such-and-such a date he told somebody, naming him, that he was working for the Daily news, is that it?

Mr. Hochman: I am not sure of the exact year, I am sure of the conversations.

The Court: With a person?

Mr. Hochman: With people.

The Court: Identify your person and ask him whether or not he did say such-and-such a thing to them on or about that date.

Mr. Hochman: My information, your Honor, as related by the witness is that when asked from time to time by people, what does he do, he replies, "I

Testimony of Samuel G. Mahdesian.)

ork for the Daily News." Now that has been going
n, according to the witness and according to what
ne witness has said, through the years. I think it is
ithin his purview if he had no trouble with the
uestion to answer it subject to good cross-examina-
on perhaps.

Mr. Binford: That is a conclusion of the witness
the best, your Honor. [89]

The Court: It is not a proper impeachment
question.

Mr. Hochman: I don't mean to impeach him; I
m trying to show how this witness considers what
e has been doing for the past 30 years.

The Court: That is wholly immaterial.

Mr. Hochman: No further questions.

The Court: Also a conclusion of the witness.

Mr. Hochman: That is all.

The Court: Step down.

Do you have any cross-examination?

Mr. Binford: No questions.

The Court: By the way, do you have a contract
milar to Exhibit 1?

The Witness: Yes.

The Court: You have operated under the terms
of the contract like that at all times?

The Witness: Yes, sir.

The Court: Do you pay your boys different
rates?

The Witness: Yes, sir.

The Court: And they get a different rate of pur-
chase from you?

(Testimony of Samuel G. Mahdesian.)

The Witness: Yes.

Q. (By Mr. Hochman): Mr. Mahdesian, do you also operate under the collective bargaining agreement of the Guild? [90]

Mr. Binford: Just a moment. That calls for a conclusion of this witness. He is not a party to that contract.

Mr. Hochman: He is a beneficiary.

The Court: Objection sustained.

Do your carriers belong to the union?

The Witness: No.

The Court: Do you maintain an office?

The Witness: Yes, sir.

The Court: Outside of your home?

The Witness: Yes, sir.

The Court: Does the Daily News pay the expense of it?

The Witness: No, sir.

The Court: Or reimburse you for it?

The Witness: No, sir.

The Court: Your relation with the Daily News in so far as the paper is concerned is that you buy papers from them and pay them, is that right?

The Witness: Yes, sir.

The Court: And then sell the papers?

The Witness: Yes, sir.

The Court: Any questions?

Mr. Binford: No questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness. [91]

Mr. Hochman: Let me see.

The Court: You do not know whether you will have another witness or not?

Mr. Hochman: I think we can waive him, your Honor. It would probably be cumulative.

The Court: You mean you want to rest now?

Mr. Hochman: Yes, your Honor.

The Court: The Government rests?

Mr. Hochman: Yes.

Mr. Binford: The plaintiff rests.

The Court: Very well.

Do you want to argue the matter?

Mr. Binford: If your Honor would like to hear argument I will be happy to argue the case or I would be glad to submit it on written argument, whichever your Honor would prefer.

The Court: If it can be decided on a question of fact, which it can, and to me it is a very simple matter, but if it comes into a question as to whether or not the Stockholders Publishing Company was entitled to deductions according to that impossibly worded Section 1601(b), whatever it is, that is another matter. As far as the question of fact is concerned, I do not think that there is any doubt but that these people are independent contractors.

Mr. Hochman: Has your Honor looked at those collective [92] bargaining agreements?

The Court: Yes, I did.

Mr. Hochman: Could I cite your Honor to several parts of them?

The Court: I think they are pretty well cleared up here by this letter.

Mr. Hochman: That letter is not in front of the 1945 contract, which is now Defendants' Exhibit C.

The Court: It is for the purpose of terminology only. It is in the '42; I do not think there is anything in '43.

Exhibit C, you say?

Mr. Hochman: Yes, your Honor, Section 14. That will be the 1945 contract, Section 14.

The Court: Yes?

Mr. Hochman: Subsection 2.

The Court: Section 14 reads:

· "No district man shall be required to do the work of a truckdriver, and no truck driver shall be required to do the work of a district man."

Is that it?

Mr. Hochman: No, your Honor. This is the collective bargaining agreement by the Guild. Mr. Pollock testified that they operate under the Guild. Sections 18 to 22 specifically cover them, and Section 14.

Now when you choose a job classification, when they [93] want to choose they decided it in terms of underlying and specific information for perhaps later arbitration disputes, what do they go and choose? They say a truckdriver can say he has been a truckdriver but he can't be a route district man and a route district man can't be a truckdriver. Do you think, your Honor, that it is reasonable to assume that they were making the comparison between an independent contractor and an employee or were

they rather trying to show an employee with a certain job classification cannot do the work of another employee with another job classification? This was entered into by the Stockholders Publishing Company with the Guild. It is rather interesting that they chose that terminology.

The Court: Where is a district man defined in this contract?

Mr. Hochman: In Section 22, your Honor, Subsections 3 and 4.

That calls them route district men. Are they the same as district men?

Mr. Hochman: Yes, your Honor.

Mr. Binford: While it is not in evidence, there are such things as salaried district men, too. They are not concerned in this proceeding in any way, but there are district men who are on salary.

Mr. Hochman: The Government doesn't have the burden to [94] show that. I asked my question of the witnesses as route district men.

The Court: I think you are wasting your time, counsel.

Mr. Hochman: I believe so, but I want the record to reflect it.

The Court: There is no doubt in my mind but what, as a question of fact, they are independent contractors.

Mr. Hochman: Mr. Fahs testified his father had the route and yet he had to gain it and apply for it in the same manner as a stranger would. In other words, there is no three ways of delivering a newspaper.

The Court: Suppose you want to be a dealer for Cadillac automobiles. Do you not have to go and make a deal with the Cadillac people?

Mr. Hochman: Yes, your Honor. But there is no three ways of delivering a newspaper.

The Court: You just cannot go out and start selling Cadillacs. And when you make your deal with them do they not give you a certain district or area, and is that not true in every kind of merchandising business?

Mr. Hochman: Yes, your Honor, but in their own contract, Plaintiff's Exhibit 1 that is in evidence, if your Honor cares to read it——

The Court: I did read it.

Mr. Hochman: It states that these men may be fired at [95] any time for any reason. Now, then, when you have a situation where a man may be fired——

The Court: It says that they may terminate the contract. It has terms in it whereby the Daily News can terminate, and it has terms in it whereby the other people can terminate.

Mr. Hochman: There is mutuality, your Honor, they can both leave each other. But if you want the position and your—I shall use the word “your employer”—or the man you are associated with can terminate your employment at any time, then, your Honor, I humbly suggest that a suggestion coming from that man's employee, namely, a supervisor, carries with it a lot more weight than Webster normally gives to a “suggestion.”

The Court: I think that is probably true, but

the test of whether a person is an independent contractor or an employee is whether or not the person having the relationship with him, that is to say, ordinarily an employer, controls him in his means and method of doing his work or whether he only controls the result.

Mr. Hochman: If it please the court, there are no three ways of delivering a newspaper. It is almost an abecedarian. You either hire a man to paint your house or you hire a contract painter. If you hire the man to paint your house you pay him so much an hour and so much a day, but you don't [96] stand beside him and guide his hand. You are hiring a painter.

Here, too, there is no difficulty attached in the sense of delivering these newspapers. There is no discretion, there are no two or three ways. The Daily News covers the promotional activity. Mr. Mahdavian pointed out that they tell him which columnist to boom, that Eleanor Roosevelt or Drew Pearson is going to do something. They can fire them. They run their own promotional campaign. Mr. Fahs says that they set the prices.

The Court: That does not make them employees. It is just general knowledge that a manufacturer, for instance, will put on all kinds of promotional advertising but he still sells beer to the corner grocer who is an independent contractor and he sells it to him in any way that he can. But because the brewery might put on some singing commercial or put billboards all over a state or put out newspaper advertising, that does not make an employee.

Mr. Hochman: Taking that one isolated example, your Honor is correct, but put them all together and you get a situation that does not bespeak an independent contractor. There is no independence to this contracting relationship.

The Court: I am sorry, counsel, but I cannot agree with you.

I do not think it is necessary to determine these other questions of law in view of the fact that it turns upon this [97] point of fact, and the plaintiff will have judgment, and will also prepared findings of fact and conclusions of law.

(Whereupon, at 4:10 o'clock p.m., court was adjourned.) [98]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 29th day of July, A.D. 1954.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed February 4, 1955. [99]

Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 54, inclusive, contain full, true and correct copies of Complaint in case 11879-PH; Answer in case 11879-PH; Complaint in case 14627-PH; Answer in case 14627-PH; Minute Order of June 29, 1954; Findings of Fact and Conclusions of Law in case 11879-PH; Judgment in case 11879-PH; Findings of Fact and Conclusions of Law in case 14627-PH; Judgment in case 14627-PH; Notice of Appeal in case 11879-PH; Notice of Appeal in case 14627-PH; Appellants' Designation of Contents of Record on Appeal; Order Extending Time to Docket Cause on Appeal in case 11879-PH; Order Extending Time to Docket Cause on Appeal in case 14627-PH; which, together with the Reporter's transcript of Proceedings on Trial, and the original Plaintiff's Exhibits 1 to 4, inclusive, and Defendants' Exhibits A, B, and C, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 7th day of February, 1955.

[Seal] EDMUND L. SMITH,
 Clerk;

By /s/ THEODORE HOCKE,
 Chief Deputy.

[Endorsed]: No. 14647. United States Court of Appeals for the Ninth Circuit. Harry C. Westover, Former Collector of Internal Revenue, Sixth Collection District of California, Appellant, vs. Stockholders Publishing Company, Inc., a Corporation, Appellee. Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, Appellant, vs. Stockholders Publishing Company, Inc., a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed February 8, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 14647

VESTOVER and RIDDELL,

Appellants,

vs.

STOCKHOLDERS PUBLISHING COMPANY,
INC.,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY ON
APPEAL

Pursuant to the provisions of Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, the following are appellants' Statement of Points on Appeal:

I.

The District Court erred in finding and concluding that the individuals concerned were independent contractors and not employees of the plaintiff-appellee.

II.

The trial court erred in that the evidence does not support the findings of fact.

III.

The trial court erred in that the conclusions of law are not supported by the findings of fact.

IV.

The trial court erred in that the judgment is not supported by any substantial evidence.

V.

The trial court erred in that the plaintiff-appellee did not sustain its burden of proof in the trial court.

VI.

The trial court erred in certain rulings wherein testimony of plaintiff-appellee's witnesses was admitted into evidence over the objection of defendants-appellants' counsel.

VII.

The trial court erred in sustaining the objection of plaintiff-appellee's counsel to certain questions propounded by defendants-appellants' counsel notwithstanding an offer of proof.

Dated: This 23rd day of February, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

BRUCE I. HOCHMAN,
Assistant U. S. Attorney;

/s/ BRUCE I. HOCHMAN,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 24, 1955.